Supreme Court, U.S.
FILED

No. 94-956 NOV 25 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
Petitioners,

v.

ALABAMA POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

APPENDIX TO

ROBERT A. JABLON *
CAROLYN P. CARMODY
SPIEGEL & MCDIARMID
1350 New York Avenue
Suite 1100
Washington, D.C. 20005-4798
(202) 879-4000

ROBERT D. THORINGTON
W. STANLEY GREGORY
WENDELL CAULEY
PAMELA L. MABLE
THORINGTON & GREGORY
504 South Perry Street
Montgomery, Alabama 36102
(205) 834-6222

Counsel for the Municipal Utilities of Albertville, Alabama, et al.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

160 pp

TABLE OF CONTENTS

APPENDIX A — Page

Judgment of the United States Court of Appeals for the Eleventh Circuit Affirming the Decision of the District Court in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al.* May 23, 1994 ..... 1a

APPENDIX B

Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division Granting Motion to Dismiss and Motion for Summary Judgment in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al. v. Alabama Power Company, et al.* March 4, 1992 ..... 9a

APPENDIX C

Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition(s) for for Rehearing and Suggestion(s) of Rehearing *En Banc* in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al.* August 26, 1994 ..... 27a

APPENDIX D

Opinion of the United States Court of Appeals for the Eleventh Circuit Reversing and Remanding a Dismissal Order to the District Court in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al.* July 5, 1991 ..... 29a

APPENDIX E

Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division Denying Motion to Intervene and Granting Motion to Dismiss in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al.* January 9, 1990.. 52a

TABLE OF CONTENTS—Continued

STATUTORY PROVISIONS

APPENDIX F — Page

Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990) 71a

APPENDIX G

Clayton Act, 15 U.S.C. § 26 (1988) 72a

APPENDIX H

Ala. Code §§ 37-14-1 to -17 (1992) 73a

APPENDIX I

Ala. Code §§ 37-14-30 to -40 (1992) 97a

MISCELLANEOUS

APPENDIX J

Agreement Between the City of Tarrant City, Alabama and Alabama Power Company. June 8, 1983 ..... 126a

APPENDIX K

Excerpt from Agreement Between Covington Electric Cooperative, Inc. and the City of Elba and the City of Elba Water ad Electric Board. January 29, 1985 ..... 139a

APPENDIX L .....

Excerpt from Agreement Between Southern Pine Electric Cooperative and Alabama Power Company. January 18, 1985 ..... 142a

APPENDIX M

Affidavit of Dr. John W. Wilson for the United States District Court for the Middle District of Alabama, Northern District in *Municipal Utilities Board of Albertville, et al. v. Alabama Power Company, et al.* November 26, 1991 ..... 145a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-6268

MUNICIPAL UTILITIES BOARD OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA; and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE,

Plaintiffs-Appellants,

v.

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIREGRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELEC-

TRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVER ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERATIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATIVE; COOSA VALLEY ELECTRIC COOPERATIVE; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION and ARAB ELECTRIC COOPERATIVE, INC.; ALABAMA ELECTRIC COPERATIVE, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

May 23, 1994

Before TJOFLAT, Chief Judge, KRAVITCH Circuit Judge, and RONEY, Senior Circuit Judge.

PER CURIAM:

I.

This is an antitrust action brought by thirty Alabama municipalities (the "Cities") against the Alabama Power Company and twenty-two rural electric cooperatives,[1] all of whom are suppliers of electricity in the retail electric market. The Cities claim that two Alabama statutes, 1984 Ala. Acts 206 (the "1984 Act"), codified as Ala.Code §§ 37-14-1 to -17 (Michie 1992), and 1985 Ala. Acts 645 (the "1985 Act"), codified as Ala.Code §§ 37-14-30

[1] The Cities also sued the cooperatives' association, the Alabama Rural Electric Association of Cooperatives. For convenience, we refer only to the defendants named in the text.

to -40 (Michie 1992) (collectively, "the Acts"), run afoul of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988), because the statutes incorporate fifteen agreements between two suppliers of electricity (of which one or both are defendants in this litigation) that allocate service territories and, thus, eliminate competition among such suppliers in those areas.

In an earlier proceeding, we agreed with the district court that the state action immunity doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), controlled the disposition of this case. *Municipal Util. Bd. of Albertville v. Alabama Power Co.,* 934 F.2d 1493, 1501-02 (11th Cir. 1991). As a result, we examined the legislation to determine whether, as the district court held, *Midcal*'s two-part test barred the Cities' claims for relief. *Id.* at 1502-05.

The first part of *Midcal*'s test asks whether the challenged legislative enactment implements a clearly articulated state policy to restrain competition; the second part asks whether the state has actively supervised the anticompetitive conduct. *Midcal,* 445 U.S. at 105, 100 S.Ct. at 943. We concluded that the Acts challenged here satisfied the first prong of the *Midcal* test because "[t]he Alabama legislature has clearly articulated a policy to displace competition in the retail electric market" in order "to prevent duplication of electric facilities." *Municipal,* 934 F.2d at 1502. We were unable to determine, however, whether the second part of the *Midcal* test was satisfied because the private agreements, which the Acts incorporated, were not in the record. For this reason, we could not tell whether these agreements authorized the parties, in implementing them, to engage in anticompetitive conduct that would not require the state's prior approval. We therefore remanded the case to the district court for a resolution of this issue. We told the court

that, if the implementation of the incorporated agreements satisfied the second *Midcal* requirement, dismissal of the suit would be proper. *Id.* at 1504-05.

On remand, the district court examined the agreements in question, concluded that the requisite state supervision of the implementation of the agreements was present, and dismissed the case. The Cities now appeal, challenging this conclusion. We affirm.

II.

Only three of the agreements the Acts incorporate are involved in this appeal. These agreements authorize the parties, by mutual consent, to assign new customers between themselves. The first is the Agreement between Tarrant City, Alabama, and the Alabama Power Company dated June 8, 1983, which assigned all new customers having an initial contract demand of less than 5,000 kilowatts to the city:

> [P]rovided, however, if [Tarrant] City and [the Alabama Power] Company mutually agree, upon request for such agreement by the customer, that service by Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by the Company.

The second is the Agreement between the Southern Pine Electric Cooperative, Inc., and the City of Evergreen, Alabama, which assigned to Southern Pine all existing customers, and all new customers locating within 300 feet of Southern Pine's then existing electrical lines, within an area then proposed to be annexed by the City:

> [P]rovided, however, that any new industry which might locate in these areas shall be negotiated as to who will serve the industry by the Governing Bodies of the City of Evergreen and Southern Pine Electric Co-op.

The third is the Agreement between the Utilities Board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954, which, in relevant part, established a boundary separating the service areas of the Utilities Board and the Cooperative and provided that, if either party refused to make service available to prospective customers in its service area, the other party might, after submission to it by the prospective customer of proof of the refusal, and after giving six months' notice, commence serving the customer.

Standing alone, the provisions we have quoted appear to give the parties the right to allocate new customers without the Legislature's approval. These provisions, however, do not stand alone, as the district court concluded; they must be read *in pari materia* with the incorporating provision of the 1985 Act, section 37-14-36. That section states:

> The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:
>
> . . . .
>
> (3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.
>
> . . . .

> (13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967 relating to electric service in the City of Evergreen.
>
> . . . .
>
> (15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.
>
> . . . .
>
> Subsequent to May 20, 1985 [the effective date of the 1985 Act], suppliers [of electricity] shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers affected by the agreements, respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; *provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed by the legislature.*

Ala.Code § 37-14-36 (Michie 1992 (emphasis added). Under the 1985 Act, therefore, the Alabama Legislature must explicitly approve any customer allocations the parties might wish to make.

The Cities urge us to reject the district court's conclusion—that section 37-14-36 covers the implementation of these agreements—because it makes no practical sense.[2] Under the district court's approach, the Cities observe, it might take months before the Legislature could approve the parties' agreement as to which party should serve a new customer; consequently, the customer might go without electricity.

---

[2] The Cities concede that section 37-14-36 would cover the parties' "new" agreements; that is, agreements not made in the process of implementing the existing agreements.

Notwithstanding this possibility, we reject appellants' argument. The district court's interpretation is consistent with the plain language of the statute. When construing a state statute, we look to state rules of statutory construction, because the same rules of construction apply in a federal court as would apply in a state court. *See Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125 (5th Cir.1980).[3] Under Alabama law, statutes are presumed valid, and a reviewing court must adopt the construction of a legislative enactment that will sustain its validity. *See House v. Cullman County*, 593 So.2d 69, 71-72 (Ala. 1992). The district court faced a choice between two reasonable interpretations of the statute; it chose the interpretation that sustained the Act's validity and furthered the obvious intent of the Alabama Legislature to confer state action immunity to the parties of the incorporated agreements. Had the court interpreted the Acts as not requiring legislative approval of the parties' implementation of the three agreements, the Acts would not have conferred state action immunity. Although legislative approval of a customer allocation might be delayed, in a given case, it is not our province to condition immunity from antitrust prosecution on the wisdom of the Legislature's decision. *See Hoover v. Ronwin*, 466 U.S. 558, 574, 104 S.Ct. 1989, 1998, 80 L.Ed.2d 590 (1984) (noting that state need not act "wisely" to be immune).

We therefore hold that the private agreements in question in this case qualify for state action immunity.[4] Ac-

---

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[4] The Cities also argue that, in applying the second part of *Midcal's* test, we must determine whether the Legislature, in incorporating the agreements into the Acts by reference, exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of

cordingly, we affirm the decision of the district court dismissing the Cities' case.

IT IS SO ORDERED.

---

deliberate state intervention. This claim is patently meritless and warrants no discussion. *See Hoover*, 466 U.S. at 567-68, 104 S.Ct. at 1995 (holding that, under the *Parker* doctrine, a state legislature's actions in adopting legislation are *ipso facto* exempt from operation of antitrust laws, because its actions constitute those of the state). *See also City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377-78, 111 S.Ct. 1344, 1352-53, 113 L.Ed.2d 382 (1991) (refusing to engage in a subjective analysis of a city's decision because it "would require the sort of deconstruction of the governmental process" that the Supreme Court has consistently sought to avoid).

APPENDIX B

[Filed Mar. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 89-H-519-N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al.*,

Plaintiffs,

v.

ALABAMA POWER COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION

In its July 5, 1991 opinion, the Eleventh Circuit affirmed this Court's prior holding that the general provisions of Ala. Code §§ 37-14-1 *et seq.* (1984 Act) and §§ 37-14-30 *et seq.* (1985 Act) satisfy the two-part test for state action immunity articulated by the Supreme Court in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1504 (11th Cir. 1991). In addition, the Court of Appeals held that the provisions of the Acts referring to specified pre-existing agreements satisfy the clearly articulated state policy requirement of *Midcal*. 934 F.2d at 1502. The Eleventh Circuit, however, could not determine based upon the record before it whether the private agreements satisfied the active supervision prong of the *Midcal* test. The Court of Appeals thus reversed and remanded the case for proceedings to determine whether

the private agreements qualified for state action immunity.[1]

The private agreements were submitted on October 11, 1991, in full text to this Court as part of defendant Alabama Power Company's renewal of its motion to dismiss and alternative motion for summary judgment. The Alabama Power Company (APC) also submitted the affidavit of Michael L. Menk. The issues on remand have been briefed fully by the parties, and the Court conducted a hearing to allow the parties to argue their positions.

BACKGROUND OF THE ACTS AND INCORPORATED AGREEMENTS

The provisions of the Acts which are the subject of this remand are Section 37-14-36 (incorporating separate agreements into the 1985 Act) and Section 37-14-8 (incorporating separate agreements into the 1984 Act). The agreements incorporated into each Act by these sections were, according to the Alabama Legislature, "reviewed by the Legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article." *Ala. Code* §§ 37-14-36 and 37-14-8. Both the 1984 and the 1985 Acts were passed for the purpose of eliminating duplicative electric facilities. The determinations by the Alabama Legislature were credited by the Eleventh Circuit in its discussion of the clearly articulated state policy issue, 934 F.2d at 1502 (citing *Ala. Code* §§ 37-14-8 and 37-14-36), and this Court also credits the Legislature's findings insofar as they bear on the issue of active state supervision.

The Acts address (1) those electric service activities existing outside municipal limits as of April 26, 1984; (2) those electric service activities inside existing muni-

---

[1] The Eleventh Circuit also reversed the denial of the City of Lincoln's motion to intervene.

cipal limits, and (3) those electric service activities contained in private agreements incorporated by reference into the Acts.[2]

The agreements incorporated into the two Acts involve various combinations of municipal electric suppliers, rural electric cooperatives, Alabama Power Company, and, in one instance, the Tennessee Valley Authority. Municipalities in the State of Alabama are parties to eight of the fifteen agreements incorporated into the 1985 Act and five of the twelve agreements incorporated into the 1984 Act. In several instances, municipalities which appear as plaintiffs in this proceeding challenging the Acts in general and the incorporated private agreements in particular are also parties to the agreements. For example, the cities of Andalusia, Bessemer, Brundige, Cullman and Evergreen are all parties plaintiff in this proceeding and each of them was a party to an agreement listed in Section 37-14-36 of the 1985 Act. A list of the agreements is attached as an appendix.

As with the Acts, the incorporated agreements typically recite that they were entered into to eliminate inefficient duplication of electric distribution facilities. *See, e.g.*, Agreement among City of Bessemer, Alabama Power Company and TVA dated as of August 12, 1971 (recognizing "wasteful and undesirable duplication of facilities"); Agreement between City of Tarrant City and Alabama Power Company dated as of June 8, 1983 (reciting parties' desire to "eliminate to the fullest extent possible consistent with the public interest duplication of Company's and the City's facilities with corresponding preservation of and improvement in aesthetic and environmental values and improvement in electric service reliability"); Agreement between Cullman Electric Cooperative and

---

[2] Because the issue on remand concerns only those private agreements incorporated into the acts, the Court will only address those private agreements and not the general provisions already addressed by the Eleventh Circuit. *See* 934 F.2d at 1497.

Alabama Power Company dated as of January 2, 1984 (referring to "wasteful and undesirable duplication of facilities").

Most of the incorporated agreements reflect that they were executed around the time the Acts were adopted and state that they would become null and void if not approved and adopted by the Alabama Legislature. *Ala. Code* § 37-14-8(4)-(11) and § 37-14-36(4)-(12). These agreements generally address the duplication of facilities by delineating specific geographic boundaries and granting each party the exclusive right to serve customers in an assigned area. Some of the agreements illustrate these boundaries with maps accompanying the agreements. Several of the agreements executed contemporaneously with the Acts also grant one electric supplier the option of purchasing facilities of the other in particular areas. The provisions of these agreements established the terms and conditions under which the purchase option could be exercised.

The remaining agreements incorporated into the Acts were entered into prior—in some cases, many years prior —to the adoption of the Acts.

Both the 1984 and 1985 Acts state that the legislature intended to incorporate specific procedures for the elimination of duplication of electric facilities from certain listed agreements as those agreements existed at the time the Acts were passed. The operative sections of both Acts refer to the agreements as having "heretofore" been negotiated by retail electric suppliers. Each listed agreement is incorporated by reference to both the identity of the parties and the date of the agreement. Both Acts permit the adoption of additional agreements which are consistent with the purposes and policies of the Acts, but no such new agreement may "be valid unless and until it has been reveiwed by the Legislature and the Legislature has amended this section to mandate the implementation of the provisions of such agreement." *Ala. Code*

§§ 37-14-36, 37-14-8. The 1985 Act also provides that if any of the listed agreements are terminated, the general rules of the 1985 Act will govern thereafter.

DISCUSSION

The Eleventh Circuit concluded that the general provisions of the Acts reflect that the Alabama Legislature has exercised sufficient control over the Acts' service territory allocations to satisfy the active supervision test applicable to private parties under *Midcal*. The Court of Appeals stated that the general provisions of the Act have "placed no decision-making authority over restraints on competition in the hands of private parties," and that such provisions set forth precise procedures for electric suppliers to follow in implementing the service area allocations promulgated by the Legislature. 934 F.2d at 1053. For the following reasons, this Court determines that these same findings can be made as a matter of law with regard to the incorporated agreements and thus that the agreements qualify for state action immunity.

The Court treats the defendants' motions as motions for summary judgment. As the discussion below indicates, the Court determines that "no genuine issue as to any material fact" exists. Fed.R.Civ.P. 56(c). The issue remanded by the Eleventh Circuit is one of law. The only facts added to the record consequent to this case's remand are those contained in the incorporated agreements. The actual contents of the agreements are not in dispute. Rather, the dispute between the parties is whether the terms of these agreements are sufficient to comply with the legal standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

RELEVANCE OF CIRCUMSTANCES OF INCORPORATION OF AGREEMENTS

Plaintiffs contend that the private agreements were initiated and produced by private parties rather than by the Legislature, and thus the Court should examine the circumstances surrounding the Legislature's review of the agreements. Plaintiffs further allege that because they originated with private parties, the private agreements reflect the interests of the individual parties and are not designed to represent or promote the legislative goals embodied by the Acts. Therefore, plaintiffs maintain, the Legislature had a duty to scrutinize the private agreements to ensure that they promote or, at least, do not contravene the purposes of the Acts.

The Court finds that the incorporated territorial agreements were available for study and review by the members of the Alabama Legislature and the public at or prior to the passage of the Acts. Although Section 37-14-8 of the 1984 Act recites that the agreements incorporated by reference had been "reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article," the texts of the agreements were not set out in the 1984 Act. The same is true of Section 37-14-36 of the 1985 Act. The parties, however, have stipulated that "following introduction but prior to final passage by the Legislature of Alabama of the bills that became Act No. 84-206, §§ 37-14-1 through 17, *Code of Alabama 1975* ("the 1984 Act"), and Act. No. 85-645, §§ 37-14-30 through 40, *Code of Alabama 1975,* ("the 1985 Act"), representatives of the Alabama Power Company and of the plaintiff Cooperatives delivered to the offices of the Clerk of the House of Representatives and the offices of the Secretary of the Senate of Alabama copies of the agreements listed in Section 7 of said bills as said bills read upon their first readings in the houses of the Legislature of Alabama in which they were respectively introduced." Defendant's Response to Plaintiffs'

Assertions Concerning Availability of Territorial Agreements.

In *Parker v. Brown,* 317 U.S. 341, 351 (1943), the Supreme Court held that Congress did not intend the Sherman Act to prohibit states from restraining competition. A state, however, may " 'not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *City of Columbia v. Omni Outdoor Advertising, Inc.,* —— U.S. ——, 111 S.Ct. 1344, 1353 (1991) (quoting *Parker,* 317 U.S. at 351). In order for a state to limit competition without violating the Sherman Act, a statute restraining competition must be implemented pursuant to a clearly articulated state policy to do so, and this policy must be supervised actively by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980).

As stated by the Eleventh Circuit, "[t]he second prong of the *Midcal* test requires that the state actively supervise any private anticompetitve conduct taken pursuant to the regulatory scheme." 934 F.2d at 1502. To determine whether the active state supervision requirement is met, the Court should examine "whether private parties or public authorities made the operative decisions regarding the challenged anticompetitive conduct." *Id.* at 1503. In other words, when the state creates such regulatory schemes, it must ensure that private parties retain no decision-making authority over restraints in competition.

In examining the general provisions of the Acts, the Eleventh Circuit did not look to the process by which the Legislature adopted the Acts or the level of scrutiny with which individual legislators reviewed their provisions. Rather, the Court of Appeals explored whether electric suppliers would exercise any private regulatory power under the terms of the Acts. Similarly, in order to assess whether the incorporated agreements also meet the active state supervision prong of the *Midcal* test, this

Court looks to the terms of the agreements and not to the process by which they were incorporated into the Acts.

Therefore, the Court declines the Municipalities' invitation to go behind the Legislature's statements in the Acts that it reviewed the agreements and found them to be in the public interest and not inconsistent with the Acts' purposes. Such an inquiry regarding the circumstances of the Legislature's incorporation of these agreements is not relevant to the task at hand: determining whether the terms of the agreements provide for active state supervision.

ACTIVE STATE SUPERVISION REQUIREMENT

In *Patrick v. Burget,* 486 U.S. 94 (1988), the Supreme Court elaborated upon the requirements of the active state supervision prong of the *Midcal* test:

> [T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. See *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 345, n. 7 (1987) (holding that certain forms of state scrutiny of a restraint established by a private party did not constitute active supervision because they did not "exer[t] any significant control over" the terms of the restraint. The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

486 U.S. at 101. The Court thus must determine whether the term of the agreements ensure that state officials have and exercise the authority to review any action taken under the incorporated agreements by the parties thereto.

Plaintiffs assert that the procedures contained in the incorporated private agreements do not control sufficiently

the exercise of future discretionary behavior by electric suppliers so as to satisfy the active supervision requirement.

Plaintiffs allege that several of the private agreements incorporated into the Acts vary substantially from the general provisions of the Acts by allowing unsupervised anticompetitive conduct that is inconsistent with the stated policies and purposes of the Acts. They cite as examples: (1) the agreement between APC and Pea River Electric Cooperative, (2) the agreement among Covington Electric Cooperative, the City of Eyba, Alabama and the City of Elba Water and Electric Board, and (3) the agreement between APC and Southern Pine Electric Cooperative.

Plaintiffs also contend that some agreements authorize independent revisions or ongoing, discretionary, anticompetitive conduct of the parties to the private agreements as being violative of the second prong of *Midcal*. In this regard, plaintiffs cite the agreements between the City of Tarrant City and APC, the City of Evergreen and SPEC and the Utilities Board of the City of Cullman and Cullman Electric Cooperative.

Defendants maintain that the boundaries established by the agreements are fixed and leave no room for meaningful private discretion. They respond that the agreement between Tarrant City and APC and the agreement reflected in the city council resolution adopted June 6, 1967 by the City of Evergreen contain fixed procedures for the elimination of duplication. In the case of the Tarrant City agreement, defendants point out that the procedures rely on a set of maps and other objective criteria to describe the territory of the respective electric suppliers. In the case of the City of Evergreen resolution, the cooperative was allocated new customers located along "present existing lines within 300 feet from the edge of the right-of-way of street or road, of the lots, or city blocks existing along the lines presently owned" by the cooperative.

The Court agrees with defendants' contention that the procedures contained in the incorporated agreements, like the general rules embodied in the Acts, sufficiently control the exercise of future discretionary behavior by electric suppliers to satisfy the active supervision requirement. The operative provisions of the incorporated agreements rely on fixed rules, references to known geographic boundaries such as county lines or city limits, or references to specific maps containing boundary lines or shaded areas to indicate each electric supplier's territory. Therefore, §§ 37-14-36 and 37-14-8 "set forth the precise procedures that suppliers must follow to divide service areas," and the incorporated agreements merely draw the lines in different places.

In addition to stating that the terms of the agreements control sufficiently the exercise of future discretionary behavior, defendants argue that the language of §§ 37-14-36 and 37-14-8 regarding review by the Legislature before an agreement may be adopted or changed demonstrates the Legislature's intent to leave no discretion in the hands of electric suppliers to enter into new agreements or to modify the procedures established by the incorporated agreements unless such electric suppliers petition the Legislature for review of the agreements and the Acts are amended to incorporate them.

To the extent that this Court must construe the provisions of the Acts and interpret the incorporated agreements in light of the Acts, the Court must do so in a manner consistent with its duty to "adopt the construction of a statute to bring it into harmony with the Constitution," if the statute's language so permits. *See Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So.2d 810, 815 (1944). *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Applying these principles, the Court must interpret the Acts and incorporated agreements together if such an interpretation is reasonable. In doing so, the Court concludes that the Acts require that modifications of the incorporated agree-

ments be treated as new agreements which cannot become effective without Legislative approval.

Thus, insofar as certain of the private agreements authorize revision or modification by the parties thereto, under the provision of the 1985 Act that "no subsequent agreement shall be valid unless and until it has been reviewed by the Legislature and the Legislature has amended this section to mandate the implementation of the provisions of such agreements," and such revisions must be approved by the Legislature.

The plaintiffs' challenge to both the City of Evergreen and the Tarrant City agreements is based upon a single proviso contained in each agreement. It is not clear at this point that these provisos reflect anything more than an ability of the parties to modify the agreements by mutual consent. For the reasons discussed above, the Court is of the view that any such modification of the procedures contained in the incorporated agreements would require legislative approval under the clear terms of Section 37-14-36 and its counterpart in the 1984 Act. The Acts make it clear that the Legislature intended to incorporate specific procedures from agreements existing at the time the Acts were passed. Particularly in light of the requirement in the 1985 Act that subsequent mutual agreements be approved by the Legislature in order to become effective, this Court finds that the Legislature did not intend to confer unsupervised private discretion on electric suppliers merely because it referred to two agreements which contain the provisos discussed above.

The First Circuit has stated that a federal court "should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma. Instead, for many of the reasons that the Supreme Court refuses strictly to scrutinize state economic regulation under the Fourteenth Amendment, the antitrust adjudicatory body must accept the state's apparent supervision on its face." *New England Motor Rate Bureau v. FTC,* 908 F.2d 1064, 1076 n. 18 (1st Cir.

1990). Similarly, in *Ticor Title Insurance Co. v. FTC*, 922 F.2d 1122 (3rd Cir. 1991), the Third Circuit stated:

> Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable. Instead, the state action doctrine recognizes that states can implement anticompetitive policies, even policies that depend on private actors such as Ticor, free from federal supervision where the state clearly articulates and actively supervises its policy.

922 F.2d at 1140.

The Eleventh Circuit's opinion states that the regulatory system adopted by the states need not be internally consistent to satisfy the *Midcal* test:

> [T]he Supreme Court has never stated that the regulations adopted to displace competition must be perfectly consistent with the articulated policy reasons supporting those regulations. Our inquiry under the first prong of the *Midcal* test is merely whether there is a clearly articulated policy to displace competition, not whether the adopted regulations are the best means to accomplish that policy.

934 F.2d at 1502. In remanding this cause for a determination of whether the incorporated private agreements comply with the *Midcal* test, the Court of Appeals did not suggest that inconsistency with the approach taken in the rest of the Acts would preclude a finding of immunity. The Legislature may use different rules in specific agreements that take account of local conditions or circumstances as part of its overall regulatory program to eliminate future duplication of retail electric distribution facilities, and it is not the proper role of this Court to determine whether the Legislature has chosen the best means to implement its policy.

The Court concludes that the terms of the agreements are fixed and detailed and do not provide room for inconsistent or significant future discretionary behavior by the parties. In addition, where the agreements allow the parties thereto to reach agreements about serving certain customers in particular areas, any changes to the agreements as fixed at the time of their incorporation into the Acts must be reviewed and approved by the Legislature. The combination of clearly delineated procedures and state oversight satisfy this Court that the incorporated agreements meet the active state supervision requirement and thus qualify for state action immunity.

MUNICIPAL ACTOR DOCTRINE

Because the Court determines that the incorporated agreements are entitled to immunity under the *Midcal* test, it need not reach the question of whether, because municipal entities are parties to many of the agreements incorporated into the Acts, such agreements are not subject to active supervision by the state.

CONCLUSION

In remanding this case, the Eleventh Circuit made clear that the active supervision requirement, as it applies to the incorporated agreements contained in the Acts, is capable of resolution by motion to dismiss or motion for summary judgment. 934 F.2d at 1504-05.

Pursuant to the foregoing analysis, the Court concludes that defendants' motions for summary judgment are due to be granted because the procedures contained in the incorporated agreements, like the rest of the Acts, leave no room for the exercise of meaningful private discretion over anticompetitive conduct.

A separate order will be entered in accordance with these findings.

DONE this 4th day of March, 1992.

/s/ Truman [Illegible]
United States District Judge

APPENDIX

Section 37-14-8 incorporates the following twelve separate private agreements into the 1984 Act:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 21, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983, regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Coosa Valley Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Lincoln, Alabama.

(7) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 2, 1984, regarding electric service areas in Ozark, Alabama.

(8) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 2, 1984, regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(9) Agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of Elba water and electric board dated as of January 2, 1984, regarding electric service in and around Elba, Alabama.

(10) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Flomaton and Brewton, Alabama.

(11) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983, regarding electric service in areas around Troy, Alabama.

(12) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

Section 37-14-36 incorporates the following fifteen separate private agreements into the 1985 Act [1]:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983, regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Convington Electric Cooperative dated as of January 18, 1985, regarding electric service areas in Enterprise, Alabama.

---

[1] **Of the fifteen private agreements in the 1985 Act, eleven were originally in the 1984 Act, four were additions and one agreement in the 1984 Act was not incorporated into the 1985 Act.**

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1985, regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 18, 1985, regarding electric service areas in Ozark, Alabama.

(7) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 18, 1985, regarding electric service in areas of Randolph and Tallapoosa counties, Alabama.

(8) Agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of Elba water and electric board dated as of January 29, 1985, regarding electric service in and around Elba, Alabama.

(9) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 18, 1985, regarding electric service area in Flomaton and Brewton, Alabama.

(10) Agreement between South Alabama Electric Cooperative, Inc., and the City of Troy, Alabama dated as of October 14, 1983, and January 31, 1984, regarding electrical service in areas around Troy, Alabama, and the sale of distribution facilities.

(11) Agreement between Alabama Power Company and Cullman County Electric Cooperative dated as of January 2, 1985 regarding service areas in Cullman and Winston, Counties, Alabama.

(12) Agreement between South Alabama Electric Cooperative, Inc. and the City of Brundidge dated April 11, 1984, regarding electric service in and around the City of Brundidge, Alabama.

(13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as

such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967, relating to electric service in the City of Evergreen.

(14) Agreement between Covington Electric Cooperative and the City of Andalusia reflected in and reaffirmed by the resolution of the City of Andalusia dated January 29, 1985,

(15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

[Filed Mar. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 89-H-519-N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al.*,
Plaintiffs,

v.

ALABAMA POWER COMPANY, *et al.*,
Defendants.

ORDER

In accordance with attached memorandum opinion, it is hereby

ORDERED, ADJUDGED AND DECREED that all of those motions to dismiss/motion for summary judgment filed by defendants in the above-styled cause are GRANTED. This cause is hereby DISMISSED. Costs are to be taxed against the plaintiffs.

DONE this 4th day of March, 1992.

/s/ Truman [Illegible]
United States District Judge

APPENDIX C

[Filed Aug. 26, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6268

D. C. Docket No. 89-H-519-N

MUNICIPAL UTILITIES BOARD OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA; and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE, *Plaintiffs-Appellants,*

versus

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIRE-

GRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELECTRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVE ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERATIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATIVE; COOSA VALLEY ELECTRIC COOPERATIVE; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION and ARAB ELECTRIC COOPERATIVE, INC.; ALABAMA ELECTRIC COOPERATIVE, INC.,

Defendants-Appellees.

Appeal from the United States District Court
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and RONEY, Senior Circuit Judge

PER CURIAM:

(✔) The Petitions(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7095

THE MUNICIPAL UTILITIES BD. OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF BRUNDIDGE; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF GUNTERSVILLE; THE CITY OF HARTFORD; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE,

Plaintiffs-Appellants,

CITY OF LINCOLN, ALABAMA,
a municipal corp.,
Applicant for Intervention-Appellant,

v.

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE

ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE, INC.; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIREGRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELECTRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVER ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERTIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATION; COOSA VALLEY ELECTRIC COOPERATIVE, INC.; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION; ARAB ELECTRIC COOPERATIVE, INC. and ALABAMA ELECTRIC COOPERATIVE, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

July 5, 1991

Before JOHNSON and HATCHETT, Circuit Judges, and DYER, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The plaintiffs, thirty municipal and public corporations and their boards ("the Cities") appeal the district court's order dismissing with prejudice their antitrust complaint

against twenty-two rural electric cooperatives ("the Cooperatives"), the Alabama Rural Electric Association of Cooperatives ("AREA") and Alabama Power Company ("APC").

I. STATEMENT OF THE CASE [1]

A. *Background Facts*

The Cities, the Cooperatives, and APC all own and operate electric distribution facilities in the State of Alabama. In 1979, the Alabama Legislature established the Joint Interim Committee on Electricity ("the Committee") to develop legislation "to avoid wasteful, uneconomic duplication of electric facilities, the cost of which must be borne by the consumer." 1979 Ala.Acts 764.[2] In 1984, the Legislature passed the Service Territories for Electric Suppliers Act ("the 1984 Act") for the stated purpose of limiting wasteful duplication. Ala. Code § 37-14-1 et seq. (Supp.1989). The 1984 Act assigned service territories to Alabama's electric suppliers. This legislation was subsequently held invalid by a federal district court

---

[1] On March 11, 1991, this Court issued an opinion in this case reversing the district court's dismissal of this case with prejudice and instructing the court to grant the Cities leave to amend their complaint. *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 925 F.2d 1385 (11th Cir.1991). In response to the Supreme Court's opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we withheld the mandate and instructed the parties to submit supplemental briefs addressing the effect of *Omni* on the issues in this litigation. We now withdraw our original opinion in this case and issue this corrected opinion in its stead.

[2] The Alabama Legislature instructed the Committee to develop this legislation in consultation with the three principal distributors of electricity in the state, investor-owned utilities, rural electric cooperatives, and municipal electric systems, *e.g.*, APC, the Cooperatives, and the Cities. 1979 Ala.Acts 764.

and enjoined from enforcement.[3] In 1985, the Legislature passed a second Service Territories for Electric Suppliers Act ("the 1984 Act") in an effort to accommodate the constitutional questions raised by the district court. Ala. Code § 37-14-33 (Supp.1989).[4] The Alabama Supreme Court then held that both Acts were valid. *Alabama Power Co. v. Citizens of Ala.*, 527 So.2d 678 (Ala. 1988).

The 1984 and 1985 Acts collectively "the Acts" establish three sets of rules: (1) those governing activities outside existing city limits (*i.e.*, city boundaries as of April 26, 1984); (2) those governing activities inside existing city limits; and (3) those governing the incorporation of certain listed private agreements into the Acts.

The rules governing service outside existing city limits provide that electric suppliers cannot serve premises already served by another supplier. Ala.Code §§ 37-14-3 & 37-14-32 (Supp.1989). These rules also state that electric suppliers cannot extend their facilities to service new premises located in the service area of another supplier, except for industrial customers whose electric loads exceeds 2500 kilowatts. *Id.* The Acts also provide detailed rules to assign specific service areas to each supplier. *Id.*[5]

---

[3] This Court subsequently found that this case had been wrongfully removed to federal court, and we vacated the district court's judgment. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir.1986).

[4] The 1985 Act contains a provision which states that if the courts determine that the 1984 Act was constitutional, then, with a few specified exceptions, those provisions of the 1985 Act that are inconsistent with the 1984 Act will no longer be effective. Ala.Code § 37-14-40 (Supp.1989).

[5] The Acts define the assigned service area as the area "consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in

Finally, the Acts prohibit a municipality from serving any customers outside its boundary, even if the city annexes new territory. *Id.*

The rules governing service inside city limits allow the "primary electric supplier" to purchase the facilities of other suppliers within "existing municipal limits" on terms specified in the statute. Ala.Code §§ 37-14-4 & 37-14-33 (Supp.1989). If the primary supplier elects not to purchase these facilities, the statute permits the secondary supplier to maintain these facilities and become the assigned supplier to those new customers that locate "closer to" its lines. *Id.*

The Acts also contain certain "special rules." Ala.Code §§ 37-14-8 & 37-14-36 (Supp.1989). These rules incorporate into the Acts certain listed agreements ("the private agreements") previously reached by electric suppliers. According to the Acts, these agreements govern the prevention of line duplication in the areas they cover. *Id.* The Acts permit suppliers to enter additional agreements consistent with policies and purposes of the Acts provided the suppliers obtain the approval of the Alabama Legislature. *Id.*[6]

B. *Procedural History*

On May 19, 1989, the Cities filed an antitrust complaint seeking declaratory and injunctive relief and damages against the Cooperatives, AREA, and APC (collectively, "the defendants") for conspiring to suppress competition in the retail electric market in violation of the Sherman Act, 15 U.S.C. §§ 1, 2, and the Clayton Act, 15 U.S.C. § 26. The Cities alleged that the defend-

---

whose assigned area the majority of the square footage of the premises falls shall provide the service." Ala.Code §§ 37-14-3(1) & 37-14-32(1) (Supp.1989).

[6] The 1985 Act added certain listed agreements to the agreements incorporated in the 1984 Act. Ala.Code § 37-14-40 (Supp.1989).

ants had illegally agreed to divide service territories horizontally and had conspired with members of the Alabama Legislature as well as officials of state government to immunize this antitrust violation by codifying this illegal agreement as the Acts. The complaint challenged all of the defendants' actions associated with this agreement, including their efforts to petition the Alabama Legislature to pass the Acts and their actions taken pursuant to the Acts. Moreover, the Cities sought an order declaring the Acts invalid and unconstitutional.

APC, AREA, and nineteen of the Cooperatives subsequently moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Specifically, they argued that they were immune from antitrust liability under the *Noerr-Pennington* and state action doctrines. APC also argued that the Cities' claims were time-barred because both Acts were passed more than four years prior to the commencement of the action. Coosa Valley Electric Cooperative ("Coosa Valley") also moved to dismiss, arguing that the Cities lacked standing to assert a cause of action under 15 U.S.C. § 15. The City of Lincoln, Alabama, subsequently filed a motion to intervene.

On January 9, 1990, following a hearing, the district court granted the motions to dismiss with prejudice and denied Lincoln's motion to intervene. The court found that the Cities lacked standing to bring claims for any alleged antitrust injury occurring outside the service areas assigned to them by the Acts, but had standing to bring claims for such injuries within their service areas. Nevertheless, the court dismissed these latter claims, finding that the allegedly actionable conduct was immune from antitrust liability under the *Noerr-Pennington* and state action doctrines.

II. ANALYSIS

A. *Standing*

Section 4 of the Clayton Act creates a federal cause of action available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).[7] Standing to bring an antitrust claim is a question of law which we determine by examining the allegations contained in the complaint. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir.1991). It involves more than the "case or controversy" requirement of constitutional standing; it also includes "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id.* (citations omitted).

In its order below, the district court found that the Cities lacked standing to assert claims for alleged antitrust injuries occurring outside the service areas assigned to them under the Acts, but had standing to bring claims for such injuries occurring within their statutory service areas. The court reasoned that the Cities had no inherent right to compete in the retail electricity market, but derived their authority to compete solely from a delegation of state power by the Alabama Legislature. *See* Ala.Code § 10-50A-1 *et seq.* (1989 Supp.). According to the district court, the Sherman Act did not limit the Alabama Legislature's authority to restrain or retract this delegation. In its view, by passing the Acts, the Alabama Legislature had merely modified the authority it had previously delegated to the Cities by limiting the area in which and customers for whom the Cities could compete. The court

---

[7] The Cities also seek injunctive relief under Section 16 of the Clayton Act which states that "[a]ny person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.

therefore concluded that the Cities suffered no antitrust injury from any allegedly anticompetitive acts outside their statutory service territories outside the areas delegated to them by the Alabama Legislature.[8]

The Cities assert that they have standing to challenge any allegedly anticompetitive acts even if these acts occurred outside their service areas. They argue that once the Alabama Legislature delegated to them the right to compete it may not withdraw such delegation by legislation that violates federal antitrust laws.

Federal courts have labored to establish a precise test to determine whether a plaintiff has antitrust standing. *Austin v. Blue Cross and Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). This Court has recently followed a two-pronged approach to decide the issue. *Todorov*, 921 F.2d at 1449. Under this approach, we first determine whether the plaintiff has suffered "antitrust injury." *Id.* We then decide whether the plaintiff is an efficient enforcer of the antitrust laws. *Id.* (citing *Cargill, Inc. v. Monfort*, 479 U.S. 104, 110 n.5, 107 S.Ct. 484, 489 n. 5, 93 L.Ed.2d 427 (1986)); *see also Austin*, 903 F.2d at 1389.

"Antitrust injury is defined as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.' " *Todorov*, 921 F.2d at 1449 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)). In general, municipal corporations in Alabama are "creatures of the state, and possess no rights, privileges or immunities independ-

---

[8] In its brief, defendant Coosa Valley Electric Cooperatives, Inc. ("Coosa Valley") states that the district court's reasoning supports a holding that the Cities lack standing to challenge restrictions or modifications of their existing service areas. Coosa Valley therefore argues that this Court should hold that the Cities have no standing to assert any of their claims in this suit.

ent of those expressly conferred upon them by the state." [9] *City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir.1976)[10]; *State ex rel. Britton v. Harris,* 259 Ala. 368, 67 So.2d 26 (1953). In *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 487, 102 S.Ct. 3187, 3203, 73 L.Ed.2d 896 (1982), however, the Supreme Court held that a local elected school board could invoke the Fourteenth Amendment to defend its program of achieving school integration through busing from attack by the state of Washington. While noting that Washington could have reserved to state officials the right to make all decisions regarding public education and student assignment, the Court ruled that, once the state chose to adopt a system delegating control to local officials, it was obligated to operate that system in accordance with the Fourteenth Amendment. *Id.* The decision in *Washington* therefore established the principle that states may not circumscribe or rescind delegated authority in such a way that impairs federally protected rights. *Id.; see also Sailors v. Board of Educ.,* 387 U.S. 105, 109, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967) (holding that "unless the state . . . government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States v. State of Ala.,* 791 F.2d 1450, 1456 n. 5 (11th Cir.1986).

---

[9] Courts have often cited this principle as a rule that would bar any suit by a creature of the state against its creator. *City of Safety Harbor,* 529 F.2d at 1254. This Court has rejected such a per se rule. *United States v. State of Ala.,* 791 F.2d 1450, 1455 (11th Cir.1986), *cert. denied sub nom.,* 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Rather, we determine "whether any given constitutional provision or [federal] law protects the interests of the body in question. [But], if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked." *Id.*

[10] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

The situation in the instant case is analogous to the circumstance presented in *Washington*. Given the importance that the Sherman Act places on free and open competition in the marketplace, once the state of Alabama chose to delegate to the Cities the proprietary right to engage in retail electric sales, it may not rescind that right by legislation that may violate federal antitrust laws. *Washington, supra; Sailors, supra.* Moreover, the district court's delegation analysis is flawed for it has mischaracterized what the Alabama Legislature accomplished by passing the Acts. The Acts did not represent an initial independent decision to rescind or limit the Cities authority to compete in the retail electricity market followed by a second independent decision to impose a regulatory structure suspending competition in the retail electricity market. Rather, these decisions were completely intertwined; the limitation of the Cities' delegated authority to compete in the retail electricty market was a by-product of the regulatory structure dividing service territories. *See* Ala. Code §§ 37-14-3 & 37-14-32 (Supp. 1989). Moreover, the fact that the provisions of the Acts are not severable suggests that the Alabama Legislature intended to limit the Cities' authority to compete in the retail electricity market only by the specific regulatory structure set forth in the Acts. *See* Ala.Code §§ 37-14-17 & 37-14-39 (Supp.1989) (making the Acts invalid if any of the provisions suspending competition and assigning service territories are later held invalid under the constitution or laws of the state of Alabama). If the Acts are determined to violate the antitrust laws, we cannot tell whether the Alabama Legislature would have still chosen to limit the Cities authority to compete in the retail electricity market. The district court therefore erred when it concluded that the Cities had suffered no injury because they were challenging the rescission of delegated state authority.

Nevertheless, we must still determine whether the Cities have antitrust standing under the two-pronged ap-

proach discussed above. The first inquiry is whether the Cities have alleged an antitrust injury.[11] In their complaint, the Cities alleged that the defendants deprived them of the opportunity to compete for future customers by entering into a preexisting, illegal, anticompetitive agreement which divided Alabama into exclusive retail electric territories. The Cities further alleged that this illegal agreement was merely ratified by the Alabama legislature and embodied in the Acts.[12] This injury certainly falls within the class of injuries which the Sherman Act sought to protect against. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). There is a close relationship between the Cities' claimed injury and the alleged antitrust violation; the Acts limit the Cities' ability to compete for future customers by excluding them from territories where they formerly competed. A state may not immunize essentially private anticompetitive conduct from antitrust liability merely by covering it with the "gauzy cloak of state involvement." *Id.* at 106, 100 S.Ct. at 943. Because the Cities claim that the Acts represent an attempt by the State of Alabama to immunize the defendants' anticompetitive agreements, they have alleged an antitrust injury.

We must still determine whether the Cities are an efficient enforcer of the antirust laws, the second prong of the approach set forth in *Todorov, supra.* This inquiry "involves an analysis of 'other factors in addition to antitrust injury.'" *Todorov*, 921 F.2d at 1450 (quoting *Cargill*, 479 U.S. at 111 n. 6, 107 S.Ct. at 490

---

[11] As a preliminary matter, we note that the Cities are persons within the meaning of the Sherman Act. *See City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 395, 98 S.Ct. 1123, 1127, 55 L.Ed.2d 364 (1978).

[12] The Cities also alleged that the defendants conspired with unnamed state officials and members of the Alabama Legislature to enact this illegal agreement.

n. 6). These factors include evaluating whether the injury was direct or indirect. *Id.* at 1451. Although the defendants' allegedly anticompetitive conduct would also injure consumers, such conduct would also directly injure the Cities as competitors. The Cities are therefore an efficient enforcer of the antitrust laws. Because the Cities have alleged an antitrust injury and are an efficient enforcer of the antitrust laws, they have standing to challenge the defendants' anticompetitive conduct regardless of where it occurs in Alabama.

B. *Dismissal of the Cities' Claims*

When reviewing a district court's order dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court will presume the allegations of the complaint to be true and liberally construe the complaint in the plaintiff's favor. *Burch v. Apalachee Community Mental Health Servs., Inc.,* 840 F.2d 797, 798 (11th Cir.1988) (en banc), *aff'd sub nom., Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). A motion to dismiss will be denied " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)).

"[N]otice pleading is all that is required for a valid antitrust complaint." *Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Dev. Corp.,* 711 F.2d 989, 995 (11th Cir.1983) (citation omitted). A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. Conclusory allegations "will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Id.* (citations omitted).

1. *Dismissal Under the State Action Doctrine*

The district court found that the defendants enjoyed state action immunity for their actions taken pursuant to the Acts and therefore dismissed the Cities' claims relating to these actions. The Cities contend that the defendants' actions do not qualify for state action immunity for two reasons. First, they argue that they have alleged an illegal conspiracy between public officials and the defendants thereby triggering the "public co-conspirator" exception to the state action doctrine. Second, the Cities claim that the Acts are facially invalid because neither the general provisions of the Acts [13] nor the private agreements incorporated in the Acts [14] comply with either prong of the test for state action immunity set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). The Cities therefore argue that the defendants are not entitled to state action immunity for actions taken pursuant to the Acts.

While this case was pending on appeal, the Supreme Court issued its opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), holding that there was no public co-conspirator exception to the state action doctrine. Accordingly, this component of the Cities' argument is now foreclosed. We therefore address only the Cities' argument that the Acts do not satisfy the *Midcal* test for state action immunity.

In *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943), the Supreme Court held that Congress did not intend the Sherman Act to prevent

---

[13] The general provisions of the Acts are those sections which set forth the rules governing the division of the Alabama retail market into service territories. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32, 37-14-33 (Supp.1989) (collectively "the general provisions").

[14] *See* Ala.Code §§ 37-14-8 & 37-14-36 (Supp. 1989).

action by the states to restrain competition. At the same time, a state may " 'not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *Omni,* —— U.S. at ——, 111 S.Ct. at 1353 (quoting *Parker,* 317 U.S. at 351, 63 S.Ct. at 314). A state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state. *Midcal,* 445 U.S. at 105, 100 S.C.t at 943. The supervision prong prevents a state from frustrating the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct. *Id.* at 106, 100 S.Ct. at 943. Private parties charged with violating the Sherman Act, such as the defendants in this case, may assert immunity under the state action doctrine provided their actions were taken pursuant to state legislation meeting the requirements of the *Midcal* test. *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 61, 105 S.Ct. 1721, 1728, 85 L.Ed.2d 36 (1985). Accordingly, to decide whether the defendants qualify for state action immunity, we must determine whether the Acts satisfy both prongs of the *Midcal* test.

a. Clearly Articulated State Policy

The Cities concede that the Acts set forth a state policy to restrain competition in retail electric service in order to prevent duplication of electric facilities. *See* Ala.Code. §§ 37-14-1 & 37-14-30. The Cities argue, however, that the stated policy is a sham because the Acts permit some line duplication in the competition for industrial customers.[15]

---

[15] The Acts permit electric suppliers, except for the Cities, to compete for industrial customers whose electric loads exceed 2500 kilowatts, even if these customers are located in the service area

The Supreme Court has held that so "long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor Carriers*, 471 U.S. at 64, 105 S.Ct. at 1730. The state policy authorizing the anticompetitive conduct does not have to be expressly articlated, however, if the statute provides for "a regulatory scheme that inherently 'displace[s] unfettered business freedom.'" *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978)).

The Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers. *See Ala. Code* §§ 37-14-1 & 37-14-30 (reducing the costs of line duplication is the policy supporting this regulation). The sections of the Acts which incorporate the private agreements state that the Legislature has determined that these agreements are consistent with the general purpose of the Acts to avoid line duplication. Ala.Code §§ 37-14-8, 37-14-36 (Supp.1989). Moreover, as we discuss below in section IIB(1)(b), the Acts provide for a regulatory scheme that clearly displaces competition. Finally, the Supreme Court has never stated that the regulations adopted to displace competition must be perfectly consistent with the articulated policy reasons supporting those regulations. Our inquiry under the first prong of the *Midcal* test is merely whether there is a clearly articulated state policy to displace competition, not whether the adopted regulations are the best means to accomplish that policy. Accordingly, we find the Acts satisfy the first prong of the *Midcal* test.

---

assigned to another supplier. Ala.Code §§ 37-14-3 & 37-14-32 (Supp. 1989).

b. Active State Supervision

The second prong of the *Midcal* test requires that the state actively supervise any private anticompetitive conduct taken pursuant to the regulatory scheme. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943. The district court found that the Acts strictly controlled the assignment of service areas to electric providers and left no room for private discretion in the assignment of service areas. The court concluded that Alabama had actively supervised all private behavior taken pursuant to the Acts.[16]

The Cities contend that the general provisions of the Acts fail to meet the supervision prong of *Midcal* because they do not provide for a state agency to supervise private behavior under the Acts or for a method for resolving potential disputes over such issues as which electric supplier serves customers at territorial boundary lines. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32, 37-14-33 (Supp. 1989). They also state that the Alabama Legislature failed to provide for any state supervision of the private agreements incorporated into the Acts and argue that this omission causes the private agreements to violate the supervision prong of *Midcal*. *See Ala.Code* §§ 37-14-8, 37-14-36 (Supp. 1989). We will address these concerns in order.

The purpose of the supervision prong is to ensure that private anticompetitive conduct promotes state policy rather than the interests of private parties. *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). In determining whether state legislation satisfies the supervision prong, the Supreme Court has focused its inquiry upon whether private parties or public authorities made the operative decisions regarding the challenged

---

[16] The court did note that the Acts give primary suppliers in every municipality the discretion to purchase the distribution facilities of any secondary suppliers within the municipality. The terms and conditions of such purchases are strictly regulated. *See Ala. Code* § 37-14-4.

anticompetitive conduct. The Court has consistently held that state statutes which grant private actors " 'a degree of private regulatory power' " violate the Sherman Act and do not qualify for state action immunity. *Fisher v. City of Berkeley*, 475 U.S. 260, 268, 106 S.Ct. 1045, 1050, 89 L.Ed.2d 206 (1986) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 665, 102 S.Ct. 3294, 3302, 73, 1042 L.Ed.2d (1982) (Stevens, J., concurring)); *see also Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663 (holding hospital peer-review committees failed to meet the requirements of the supervision prong because private parties exercising decision-making authority were not subject to state supervision); *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (holding that statute that authorized price setting by private parties and then enforced those prices failed the supervision prong).[17]

With regard to the general provision of the Acts, the Alabama Legislature has control over all of the decisions being challenged by the Cities in this litigation, *e.g.*, to divide service territories inside and outside municipal limits and to limit competition for large industrial customers of electricity. The general provisions of the Acts have placed no decision-making authority over restraints on competition in the hands of private parties. The general

---

[17] We note that "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." *Cantor v. Detroit Edison Co*, 428 U.S. 579, 592, 96 S.Ct. 3110, 3118, 49 L.Ed.2d 1141 (1976). Where the challenged state regulation "involved a mixture of public and private decision-making . . . [despite] state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593, 96 S.Ct. at 3119. Therefore, when the challenged state statute restraining competition delegates regulatory authority to private parties, the private parties may be held liable for their actions that violate federal antitrust laws. *Fisher*, 475 U.S. at 268, 106 S.Ct. at 1050; *see also Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663; *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

provisions of the Acts set forth the precise procedures that suppliers must follow to divide service areas outside municipal limits. Ala.Code §§ 37-14-3 & 37-14-32 (Supp. 1989).[18] The Acts also grant state courts jurisdiction to resolve disputes over alleged violations of the Acts. Ala. Code §§ 37-14-9 & 37-14-37 (Supp.1989). An electric supplier may initiate an action to enjoin another supplier from violating the provisions of the Acts, *e.g.*, invading the service area of another supplier, and to obtain damages. *Id.*

The general provisions of the Acts eliminate virtually all discretionary behavior by retail electric suppliers outside their service territories and therefore attempt to ensure that all actions taken by the suppliers pursuant to the Acts will serve the policy goals of the Acts.[19] The general provisions of the Acts simultaneously reflect the Alabama Legislature's decision to limit competition in Alabama's retail electric market by dividing the state into service territories, and its determination as to means by which such division shall be accomplished. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32 & 37-14-33 (Supp.1989). Unlike the defendants in *Patrick, supra*, or *Midcal, supra*, the defendants in this litigation do not exercise any private regulatory power. Accordingly, the general provisions of the

---

[18] For example, the Acts provide the procedure for determining which supplier will provide service to a customer whose premises are located in two service areas. *See* Ala.Code §§ 37-14-3(1) & 37-14-32(1) (Supp.1989) ("Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises falls shall provide the service.").

[19] The principal discretion left to electric suppliers by the general provisions is the decision by a primary supplier within existing city limits to purchase the facilities of other suppliers within those city limits on terms specified in the Acts. Ala.Code §§ 37-14-3, 37-14-32 (Supp. 1989). Of course, electric suppliers retain their discretionary authority over the normal operating decisions necessary to service customers within their territories.

Acts fulfill both prongs of the *Midcal* test and are exempt from the Sherman Act.

This conclusion is supported by the decision in *Fisher v. City of Berkeley, supra.* In *Fisher*, the plaintiffs challenged a city ordinance imposing rent ceilings on residential real property as constituting price fixing in violation of the Sherman Act. The Supreme Court held that, because the rent ceilings were imposed by the city and not by private parties, the restraint was not concerted action within the meaning of the Sherman Act. *Fisher*, 475 U.S. at 268-69, 106 S.Ct. at 1050-51. Of course, the general provisions of the Acts challenged in this litigation divide market territories instead of imposing price ceilings. Like *Fisher*, however, government officials, not private actors, made the operative decisions codified in the general provisions of the Acts. *See also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6, 107 S.Ct. 720, 725 n. 6, 93 L.Ed.2d 667 (1987); *Morgan v Division of Liquor Control*, 664 F.2d 353, 356 (2nd Cir.1981) (holding state statute regulating liquor prices by imposing a minimum markup left little or no discretion to private parties and therefore satisfied the supervision prong of *Midcal*).

The Cities also argue that by passing the Acts the Alabama Legislature merely "ratified" a private anticompetitive agreement among the defendants. They argue that *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), stands for the proposition that the state action doctrine does not permit a state to immunize unlawful private anticompetitive conduct by passing a law declaring it legal, and they contend that this principle was bolstered by the Supreme Court's recent decision in *Omni, supra.*

The Cities are correct that the Supreme Court has long recognized that the state action doctrine does not permit a state to frustrate the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct. *Midcal*, 445

U.S. at 106, 100 S.Ct. at 943. The Court developed the two-prong *Midcal* test precisely for this reason—to ensure that state legislation that restrained competition actually furthered state goals and not merely private interests. *Id.* As discussed above, the general provisions of the Acts meet the *Midcal* test. Accordingly, with regard to the general provisions of the Acts, the Cities' ratification argument fails.

We now turn our attention to the private agreements dividing service territories in order to determine whether they meet the supervision prong of the *Midcal* test. Although the private agreements are listed in the Acts, *see Ala.Code* §§ 37-14-8, 37-14-36 (Supp.1989), the terms of these agreements are contained neither in the Alabama Code nor in the record of this case. In finding that the Acts controlled all discretionary behavior by private parties, the district court discussed only the general provisions of the Acts, not the terms of the private agreements.[20] The Supreme Court recently reiterated the principle that states may not immunize private anti-competitive conduct merely by authorizing it. *Omni,* —— U.S. at ——, 111 S.Ct. at 1353. It is to protect against just such a situation that the Court imposed the active supervision prong of the *Midcal* test. *Midcal,* 445 U.S. at 106, 100 S.Ct. at 943. Because the terms of the private agreements are not in the record of this case or in the Alabama Code, we are unable to determine whether they comply with the active state supervision prong of the *Midcal* test. We therefore cannot determine whether the private agreements qualify for state action immunity. Accordingly, we remand this question to the district court for findings consistent with our discussion of the requirements of the active state supervision prong of the *Midcal* test. In remanding this question, we make no comment

---

[20] The district court discussed the section of the 1984 Act governing private agreements, but only in reference to the mechanism for private parties to petition the Alabama Legislature to approve additional private agreements regarding service territories.

as to its proper resolution. We note, however, that if the district court should determine that the private agreements comply with the *Midcal* test then dismissal is proper.

2. *Dismissal Under Noerr-Pennington*

The district court dismissed with prejudice those claims by the Cities based on the defendants' allegedly anticompetitive conduct prior to the passage of the Acts. The court reasoned that the defendants' actions were immune from antitrust liability under the *Noerr-Pennington* doctrine because the Cities failed to allege any facts to suggest that the defendants' actions consisted of anything besides petitioning the Alabama Legislature to pass the Acts.

The Cities argue, as they did in their challenge to the defendants' claim for state action immunity, that they have alleged sufficient facts to trigger a "ratification exception" and a "public co-conspirator" exception to the *Noerr-Pennington* doctrine. The Cities accordingly claim that the district court erred in dismissing their claims. As noted above, the Supreme Court has recently held that there is no "public co-conspirator" exception to the *Noerr Pennington* doctrine. *Omni, supra.* Accordingly, the Cities claim under this theory is now foreclosed. We therefore address only the Cities' claim to a ratification exception to the *Noerr-Pennington* doctrine.

Joint efforts among competitors to restrain or monopolize trade by petitioning government officials are immune from antitrust liability under the *Noerr-Pennington* doctrine. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499, 108 S.Ct. 1931, 1936, 100 L.Ed.2d 497 (1988) (citing *Eastern RR President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-672, 85 S.Ct. 1585, 1592-1595, 14 L.Ed.2d 626 (1965)). The

boundaries of this protection are determined by "the source, context, and nature of the anticompetitive restraint at issue." *Id.* When a restraint on trade " 'is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* (quoting *Noerr,* 365 U.S. at 136, 81 S.Ct. at 529).

This Court has not recognized a ratification exception to the *Noerr-Pennington* doctrine. Moreover, such an exception would likely swallow the rule. It would permit the losers of legislative battles to claim that any coordination by their successful opponents amounted to a prior agreement which was then "ratified" by the legislature. If the *Noerr-Pennington* doctrine is to have any effect, plaintiffs cannot be allowed to use the mere existence of state legislation restraining trade to bootstrap an antitrust claim against the supporters of that legislation.[21]

III. CONCLUSION

We AFFIRM the district court's finding that the general provisions of the Acts qualify for state action immunity under the two-prong *Midcal* test. We cannot, however, make the same determination regarding the private agreements incorporated into the Acts because the terms of these agreements are contained neither in the

---

[21] The Supreme Court's holding in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), does not support the Cities' claim of a ratification exception to the *Noerr-Pennington* doctrine. In *Allied Tube,* the conduct at issue was an attempt to influence a private standard setting organization to draft codes, which were frequently adopted by state governments, that would exclude the plaintiff. This action did not qualify for protection under *Noerr-Pennington* because the defendants were not attempting to influence the government. *Allied Tube,* 486 U.S. at 504, 108 S.Ct. at 1939. In the instant case, the Cities challenge the defendants' conduct in directly petitioning the Alabama Legislature.

record of this case nor in the Alabama Code. We are therefore unable to decide whether the private agreements satisfy the active supervision prong of the *Midcal* test. Accordingly, we REVERSE and REMAND

APPENDIX E

[Filed Jan. 9, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 89-H-519-N

MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE; *et al.*,
Plaintiffs

vs.

ALABAMA POWER COMPANY; *et al.*,
Defendants

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

This cause comes before the Court on defendants Alabama Power Company (APCo), Black Warrior Electric Membership Corporation (Black Warrior), Alabama Rural Electric Association of Cooperatives (AREA), Dixie Electric Cooperative, Covington Electric Cooperative, Inc., Marshall-Dekalb Electric Cooperative, Southern Pine Electric Cooperative, Pioneer Electric Cooperative, Inc., Tombigbee Electric Cooperative, Inc., Wiregrass Electric Cooperative, Inc., Joe Wheeler Electric Membership Corporation, Clarke-Washington Electric Membership Corporation, Tallapoosa River Electric Cooperative, Pea River Electric Cooperative, Central Alabama Electric Cooperative, Sand Mountain Electric Cooperative, Franklin Electric Cooperative, North Alabama Electric Cooperative, Baldwin County Electric Membership Corporation, South Alabama Electric Cooperative, Inc., and Arab Electric Cooperative, Inc.'s (Cooperatives) motions to dismiss, filed June 12, 1989; defendant Coosa Valley Electric

Cooperative's (Coosa Valley) motion to dismiss, filed June 14, 1989; defendant Alabama Electric Cooperative's (Alabama Electric) motion to dismiss, filed September 6, 1989; and the City of Lincoln's motion to intervene as party plaintiff, filed August 11, 1989.

Defendants Coosa Valley and Wiregrass Electric Cooperative (Wiregrass) filed memoranda in opposition to the City of Lincoln's motion to intervene on August 17 and 28, 1989, respectively. Defendants APCo, AREA and Cooperatives, Wiregrass, and Coosa Valley filed briefs in support of their motions to dismiss on July 21, 1989. Defendant Black Warrior filed a brief on July 25, 1989. Plaintiffs filed a brief in response to the motions to dismiss on August 14, 1989. Defendants APCo, Cooperatives and AREA, and Coosa Valley filed reply briefs on September 1, 1989. The Court heard oral argument on October 19, 1989. Defendant Coosa Valley filed an additional brief on December 18, 1989, to which plaintiffs filed a response on December 20, 1989.

Upon consideration of the motions, the briefs and arguments of counsel, and for the reasons set forth below, the Court is of the opinion that the City of Lincoln's motion to intervene is due to be denied and the defendants' motions to dismiss are due to be granted, and this cause is due to be dismissed, with prejudice.

II. ANALYSIS: MOTION TO INTERVENE

The City of Lincoln moved to intervene pursuant to Federal Rule of Civil Procedure 24(b), which allows anyone to intervene when the applicant's claim and the main action have a question of law or fact in common. Rule 24(b) provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." As the Court is of the opinion that the proposed intervention would unduly delay the adjudica-

tion of the rights of the original parties, the motion is due to be denied.

III. ANALYSIS: MOTIONS TO DISMISS

A. CLAIMS AND DEFENSES

Plaintiffs bring this cause of action under 15 U.S.C. § 15 for injunctive relief and damages [1] for violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Clayton Act, 15 U.S.C. § 26. Plaintiffs are municipal and public corporations and boards which own and operate electric distribution facilities in various cities in the State of Alabama. Plaintiffs allege that the defendants, which are rural electric cooperatives organized under the laws of the State of Alabama and a corporation incorporated under the laws of the State of Alabama which provide electric power at wholesale and retail within the State of Alabama, entered into private agreements for the division of markets which later became embodied in the Territorial Acts of 1984 and 1985 ("Territorial Acts"), Ala. Code §§ 37-14-1 through 37-14-40 (1989 Cum. Supp.). Plain-

---

[1] Plaintiffs also request declaratory relief (presumably under the auspices of 28 U.S.C. § 2201) and request the Court to declare that the Territorial Acts are invalid and unconstitutional. Various of the defendants have noted in their briefs that the complaint fails to allege any facts which would support a finding of unconstitutionality of the Territorial Acts. Plaintiffs, at page 75 of their response brief, argue that the Territorial Acts are unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

Plaintiffs' Supremacy Clause argument presupposes a violation of federal antitrust laws, which the Court addresses regarding the issues of standing and the Noerr-Pennington and state-action doctrines. Therefore, the Court will not separately address said alleged violation concerning plaintiffs' Supremacy Clause argument.

Plaintiffs' Commerce Clause argument also appears to depend on federal antitrust laws, and Congress' enactment of such laws, under the Commerce Clause. However, the complaint fails to allege *any* facts which would support a finding that the Territorial Acts conflict with the Commerce Clause independent of any alleged antitrust violation.

tiffs allege that the defendants acted in concert with the legislature of the State of Alabama to divide the State of Alabama into exclusive retail electric service areas and prevent competition from plaintiffs in those areas. Plaintiffs allege that the defendants acted in concert with the legislature of the State of Alabama to deny plaintiffs the opportunity afforded defendants to serve certain large industrial customers in other electric suppliers' assigned service areas and to assign plaintiffs service areas different from those allocated to defendants under the general provisions of the Acts. Plaintiffs allege that defendants have monopoly power over wholesale and retail electric sales throughout a substantial part of Alabama and neighboring states. Plaintiffs allege that, as a result of defendants' actions, they have lost both actual and potential sales of electricity, actual and potential customers, and have been financially damaged in an indeterminate amount due to loss of opportunities to serve certain large industrial customers.

Defendants move to dismiss for failure to state a claim upon which relief can be granted. Defendants argue that plaintiffs lack standing to assert a cause of action under 15 U.S.C. § 15, that the petitioning for passage of legislation does not give rise to federal antitrust liability under the Noerr-Pennington doctrine, that defendants' actions taken pursuant to the Acts are protected under the state-action doctrine, and that plaintiffs' claims are barred by the statute of limitations.

For the reasons set forth below, the Court finds that the plaintiffs' complaint is due to be dismissed since plaintiffs lack standing to assert an action under 15 U.S.C. § 15 for the alleged division of territories outside of their respective spheres of operation established by the Territorial Acts, Ala. Code § 37-14-4 and for their inability to compete for large industrial customers located outside of those spheres of operation. The Court finds that plaintiffs do have standing to challenge the division of terrtories

within their spheres of operation established by the Territorial Acts, but that plaintiffs' complaint as to this claim is due to be dismissed on the basis that defendants' activities are protected under the Noerr-Pennington and state-action doctrines. The Court does not reach the issue of whether plaintiffs' claims are barred by the statute of limitations as the Court finds that this issue involves facts not present in the pleadings and therefore is inappropriate for resolution at this juncture.

B. STANDING TO SUE

In the instant case, the issue presented by defendants' assertion of plaintiffs' lack of standing is whether plaintiffs are able to suffer actual or threatened antitrust injury by the establishment of service territories or the limitation of the plaintiffs' ability to compete for large industrial customers outside of their assigned service territories. As the Court understands it, defendants base their standing argument on the premise that plaintiffs' ability to operate municipal electric services is the result of a specific grant of power delegated to plaintiffs by the State of Alabama. *See* Ala. Code § 11-50A-1 *et seq.* (1989 cum. supp.). Since the plaintiffs can only operate electric power boards and corporations by the specific delegation of power by the State, defendants argue that the State can limit the power so delegated and restrict the sphere in which municipal power corporations can operate.[2] If the State has

---

[2] Defendants argue that the State of Alabama actually so limited the plaintiffs by enacting Ala. Code § 37-14-3, which states:

> Except as otherwise provided in subdivisions (2), (3), and (4) of this section in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail electric service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier, even if the premises is within municipal limits and the electric supplier in whose assigned area the premises is lo-

chosen to so limit plaintiffs' ability to operate, then any division of territories outside of the plaintiffs' delegated sphere of operation does not affect any business interests of the plaintiffs since plaintiffs have no delegated power

---

cated has no franchise from the municipality in which such premises is located. Assigned service areas *outside existing municipal limits* are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) of this section herein, each electric supplier is hereby assigned the sole obligation, in accordance with its established rules and regulations, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984 whether or not a franchise has been granted by the municipality to the electric supplier to whom an area annexed has been assigned or to pay other electric supplier), for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises falls shall provide the service. *The above assignment shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in section 37-14-4.*

. . .

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned supplier shall provide retail electric service in any area outside existing municipal limits *unless the premises to be so served is in the assigned service area of such electric supplier.*

. . .

(6) . . . [M]unicipal annexations after April 26, 1984 . . . shall [not] affect any rights or limitations regarding

to compete for electric customers outside of their permitted spheres of operation.

Although this particular issue was not fully briefed by either the defendants or the plaintiffs,[3] the argument is one which falls within the "target area" doctrine which courts have developed to address the issue of antitrust standing.[4] In this circuit, in order to have standing to bring an antitrust action "a plaintiff must have suffered antitrust injury, which is injury of the type the antitrust laws were intended to prevent and which flows from that which makes a defendant's acts unlawful. The injury must reflect the anticompetitive effect of either the violation of antitrust law or of the anticompetitive acts made possible by the violation, and it should be the type of loss which a violation of antitrust law would be likely to cause." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir. 1984) *citing Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Put in the context of *Midwestern Waffles*, defendants' argument basically states that plaintiffs have not

---

retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article.

(Emphasis added.)

[3] Indeed, defendant Coosa Valley is the only defendant which pursued the standing issue at any length during oral argument. It included two paragraphs concerning the issue of standing at pages 9-10 of its initial brief in support of its motion to dismiss, and included an additional paragraph at pages 9-10 in its reply brief. Plaintiffs devoted three paragraphs to the standing issue at pages 93-94 of their brief in opposition to the motions to dismiss. Defendant Coosa Valley submitted an additional brief on the issue on December 18, 1989, but did not add substantially to their earlier arguments.

[4] *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1493-1497 (11th Cir. 1985) for a discussion of the various tests and methods developed by federal courts for determining whether a plaintiff has antitrust standing.

suffered an antitrust injury in having their sphere of operations limited by the Territorial Acts, since the antitrust laws do not make it unlawful for a state to retract or limit a delegation of state authority.

During oral argument, counsel for plaintiffs' argued that the State of Alabama can only exercise its sovereign power consistently with federal laws. Plaintiffs argue that if the State has delegated to the plaintiffs the authority to engage in economic activities, then the State cannot limit the plaintiffs' exercise of such authority in such a way so as to violate federal antitrust laws. Plaintiffs cite *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *Town of Orangetown v. Gorsuch*, 544 F. Supp. 105 (S.D.N.Y.) *aff'd* 718 F.2d 29 (2nd Cir. 1983) in support of their argument.

Initially, the Court finds that the cases cited do not support plaintiffs' argument. Although the *Washington* case does stand for the proposition that a state's delegation of state power cannot be exercised in an unconstitutional manner, the State of Washington's action in that case was determined to have violated the Equal Protection Clause in that it delegated state power in a racially discriminatory manner. Similarly, the *Orangetown* case merely states that a city may sue to vindicate its own proprietary interests. *City of Orangetown, supra,* at 108.

In the present case, the State of Alabama is not a defendant, and the complaint fails to set out any allegations regarding how the delegation of state power in question violates any constitutional provision or federal antitrust laws.[5] Furthermore, citing *Orangetown* merely

---

[5] Although plaintiffs' complaint alleges that the defendants in this cause have entered into agreements for the division of service territories, which would be a *per se* violation of federal antitrust laws, the question presented by the State of Alabama's restriction of its delegation of power is not whether there has been a division of territories, but whether the State of Alabama has chosen not to exercise its economic power to provide electric services outside

begs the question of whether the plaintiffs here *have* a "proprietary interest" which has been injured *by an antitrust violation.* As it has been previously noted, "Injury implies violation of a legal right." *Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156, 163 (1922). Plaintiffs here have no legal right to operate electric power facilities absent the delegation of the power to do so by the State of Alabama. As such, plaintiffs have failed to allege an antitrust violation based upon the State's failure to grant them the power to compete for new customers outside of certain specified areas. *See Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.,* 214 F.2d 414, 418 (5th Cir. 1954); *United Mine Workers v. Pennington,* 381 U.S. 657, 671 (1965). Since plaintiffs have no authority to compete for customers outside of certain areas, they cannot have been injured by any alleged division of territories outside of those areas. As such, plaintiffs lack standing to assert an antitrust action against defendants stemming from any alleged anticompetetive

---

of certain geographic areas. If the State of Alabama chooses to restrict its exercise of state power, and thereby the power delegated to plaintiffs, the Court is aware of nothing in the antitrust laws which prohibits it from so doing.

For example, those cities which did not become incorporated until after April 26, 1984 are effectively precluded by the Territorial Acts from ever forming a municipal electric corporation, Ala. Code § 11-50A-1 *et seq.* notwithstanding. However, there is nothing in the federal antitrust laws which requires the State of Alabama to allow those municipalities to form electric service corporations. As such, the injury which such municipalities may suffer does not stem from a violation of federal antitrust laws, but the decision of the State of Alabama to limit its delegation of power.

Similarly, plaintiffs do not allege that defendants have attempted to create a division of territories as regard large industrial electric customers, since there remains free competition between service areas for these customers. Rather, plaintiffs' complaint states that defendants conspired to exclude plaintiffs from being able to compete for these customers. However, the Court is unaware of any federal antitrust law which requires the State of Alabama to allow municipalities freely to compete for such customers.

acts which concern areas in which plaintiffs have no authority to compete. Accordingly, those claims contained in the complaint for injuries stemming from the division of territories outside of plaintiffs' assigned spheres of operation and from plaintiffs' inability to compete for large industrial electric customers located outside assigned areas are due to be dismissed.

C. NOERR-PENNINGTON AND STATE ACTION DOCTRINES

Although plaintiffs do not have standing to challenge any anticompetitive acts which take place outside of the areas in which they are authorized to compete, they do have standing to challenge the alleged division of service territories which occur within the areas in which they are authorized to compete. Therefore, the Court must determine whether plaintiffs have sufficiently stated antitrust violations which affect their ability to compete within these areas, or whether defendants may validly assert that their actions are protected under the Noerr-Pennington and state-action doctrines.

1. Standard to apply: 12(b)(6) dismissal

In order to disimiss an action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must fail to state a claim upon which relief can be granted. At this stage of the litigation, the Court must accept plaintiff's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

2. The Noerr-Pennington Doctrine

Defendants assert that any claims which plaintiffs base on the defendants' alleged efforts to influence the Alabama Legislature to pass the Territorial Acts do not

constitute antitrust violations under the Noerr-Pennington doctrine,[6] and therefore fail to state a claim upon which relief can be granted.

Plaintiffs respond that the recent case of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, —— U.S. ——, 108 S.Ct. 1931 (1988) has significantly narrowed the sweep of the Noerr-Pennington doctrine, and that defendants' activities fall outside of Noerr-Pennington protection as that doctrine was construed in *Allied Tube*. More specifically, plaintiffs argue that they have alleged a conspiracy between defendants and the Alabama Legislature to violate federal antitrust laws, and that such a conspiracy is not protected under the Noerr-Pennington doctrine.

Defendants reply that the plaintiffs' complaint only alleges that the defendants "acted in concert with" the Legislature, and that such a conclusory allegation without any accompanying allegations of supporting fact is insufficient to state a claim under an exception to the Noerr-Pennington doctrine, and therefore such claims properly may be dismissed under Rule 12(b)(6).

Initially, the Court notes that the holding in *Allied Tube* does not support plaintiffs' argument. The defendants in that case were alleged to have tried to influence the National Fire Protection Association's (a private organization) product standard for electrical conduit. In holding that the Noerr-Pennington doctrine did not apply to such efforts, the Supreme Court stated that "where, *independent of any government action*, the anticompeti-

---

[6] The "Noerr-Pennington doctrine" derives from the Supreme Court's decisions in *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In those cases the Supreme Court held that the Sherman Antitrust Act does not apply to attempts to influence public officials or the passage or enforcement of laws, even though the requested official action would produce a restraint on trade or a monopoly. *Noerr*, 365 U.S. at 135; *Pennington*, 381 U.S. at 670.

tive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action." *Allied Tube,* 108 S.Ct. at 1936. (Emphasis added). The Supreme Court reaffirmed, however, that where restraint of trade is the result of valid governmental action, those urging the government action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Id.* As the Court determines that the instant case is no "independent of any government action", it finds the holding of *Allied Tube* inapposite to the facts alleged in the case *sub judice.*

Plaintiffs also argue that the private action complained of in the complaint was not genuinely aimed at procuring favorable government action and therefore was a mere sham that cannot be deemed a valid effort to influence government action. Plaintiffs rely on *California Motor Transport Co. v Trucking Unlimited,* 404 U.S. 508 (1972), and other cases which declare that a conspiracy between public officials and a private entity constitutes an exception to Noerr-Pennington protection. Upon a close reading of the cases cited by plaintiffs, the Court finds that the "sham" or "co-conspirator" exception applies only where the actions of the private entities have effectively blocked a plaintiff's access to the decision-making tribunal and have usurped the public decision-making process. In the legislative arena, such usurpation may be shown by evidence that public officials were bribed or otherwise were improperly coerced into taking the desired action. *See id.,* 404 U.S. at 513. In the present case, plaintiffs fail to allege *any* facts in their complaint that would indicate that the co-conspirator exception to the Noerr-Pennington doctrine would apply to the passage of the Territorial Acts. Plaintiffs merely allege that the defendants "acted in concert with" the Alabama Legislature in passing the Acts. However, the agreement of a legislator to support a cause does not render that legislator a "co-conspirator" for purposes of the Noerr-Pennington

doctrine. *See Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975). Accordingly, the Court finds that any allegations of a conspiracy contained in the complaint are conclusory at best and therefore that the "sham" or "co-conspirator" exception to the Noerr-Pennington doctrine does not apply. As such, the complaint fails to state an antitrust claim for actions taken by the defendants in petitioning the Alabama legislature for the passage of the Territorial Acts, as federal antitrust law does not prohibit such petitions.

3. The State-action Doctrine

Plaintiffs claim that the actions of the defendants taken pursuant to the Territorial Acts in creating service area lines and purchasing the facilities of secondary service providers within the primary service provider's assigned area violate the Sherman Act and that plaintiffs have been harmed thereby.

Defendants argue that actions taken pursuant to the Territorial Acts do not violate federal antitrust laws since the Sherman Act was not intended to restrain state action or action taken by private parties which is directed by the state. Defendants cite *Parker v. Brown*, 317 U.S. 341 (1943) and *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980) in support of their argument.

Plaintiffs recognize that *Parker v. Brown* does establish a state-action exception to the Sherman Act, but counter that such exception does not apply in this case for two reasons. First, plaintiffs argue that they have alleged a conspiracy between public officials and the defendants which takes the actions complained of outside of the state-action exception. Second, plaintiffs contend that the Territorial Acts are invalid under the two-prong *Midcal Aluminum* test because the Acts fail to fulfill either prong of the test.

Defendants reply that the conspiracy alleged in the complaint consists of conclusory statements and that the complaint fails to allege any facts which would tend to establish a conspiracy. Defendants also contend that the Territorial Acts satisfy both prongs of the *Midcal Aluminum* test. Therefore, defendants argue, the complaint fails to state a claim upon which relief can be granted since the actions complained of fall outside of the actions prohibited by the Sherman Act.

3a. Public Co-Conspirator Exception

Plaintiffs' state-action co-conspirator argument differs somewhat from their Noerr-Pennington co-conspirator argument in that plaintiffs allege that the Alabama Legislature merely ratified, or "rubber stamped" pre-existing private territorial agreements and that such public ratification of private anticompetitive agreements cannot make such agreements lawful under the state-action doctrine.

The Court takes as true plaintiffs' allegations that defendants entered into private unlawful territorial agreements prior to the passage of the Territorial Acts, and that the Alabama Legislature incorporated such agreements into the Acts. Taking these allegations as true, the question with which the Court is presented is whether the Alabama Legislature can incorporate private agreements into a comprehensive regulatory scheme and not run afoul of federal antitrust laws. Although plaintiffs argue that such incorporation automatically renders the Territorial Acts a product of "private action" rather than "state action", the Court finds nothing in the cases cited by plaintiffs which indicate that a state cannot adopt an otherwise unlawful and pre-existing scheme *if* the state does so with the intention to displace competition with regulation and *if* the state actively supervises the anticompetitive conduct so that private actors lose the discretion to modify the scheme to suit their private needs. As such, the Court finds that the "public co-conspirator" argument set forth by plaintiffs does not differ analytically

from the determination of whether the Territorial Acts constitute valid state action under the *Midcal Aluminum* test, allegations of conspiracies notwithstanding.[7]

3b. The *Midcal Aluminum* Test

Although the state-action doctrine was originally set forth in *Parker v. Brown, supra,* the Supreme Court recently has established a two-part test to determine whether a particular action falls within such doctrine. In *Midcal Aluminum,* 445 U.S. at 105, the Supreme Court stated that the challenged restraint on competition must be first, one clearly articulated and affirmatively expressed as state policy, and second, must be actively supervised by the state itself.

The first prong of the test avoids situations such as those presented in *Northern Securities Co. v. United States,* 193 U.S. 197 (1904) and *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). In *Northern Securities* an antitrust defendant attempted to shield its acquisition of a competitor by arguing that the acquisiton was lawful under the state's corporate laws. The Supreme Court rejected the defendant's argument and found that the creation of general corporate laws could not displace federal antitrust laws and that the defendant could not accomplish an unlawful end through otherwise lawful means. 193 U.S. at 346. In *Cantor* the defendant attempted to shield its practice of providing light bulbs to its customers free of charge and then adding the cost of the bulbs to its utility rates by arguing that the rates were approved by the public service commission and could not be changed until a new tariff was approved by the commission. In finding that defendant's actions were not shielded from antitrust laws, the Supreme Court

---

[7] To the extent that plaintiffs attempt to rely on their allegation that the Alabama Legislature "acted in concert with" the defendants, the Court finds such allegations to be conclusory and to add nothing to their argument. *See* discussion at 12-13 *infra.*

noted that the anticompetitive conduct complained of, that is the sale of light bulbs, was not required by the state laws governing the operation of public utilities and that the decision to market light bulbs in the manner challenged was not the result of state action but was the result of private action. 428 U.S. at 593.

In the case at bar, the Court finds from the overall structure of the Territorial Acts that it was the clear intention of the State of Alabama to displace competition for the provision of electric power services to all electric power users other than large industrial users with a system of regulation. The Territorial Acts are not general legislation but specifically establish a system whereby electric service territories are assigned and provide procedures for the transition to a service territory scheme. The Territorial Acts can have no other purpose but to displace competition with the system established by the State. As such, the Court finds that the challenged activity satisfies the first prong of the *Midcal Aluminum* test.

The second prong of the test requires that the state actively supervise the anticompetitive action subject to challenge. This prong of the test appears to be designed to keep states from setting the foxes to watching the hen house. The pricing scheme challenged in *Midcal Aluminum* failed this prong of the test in that the State of California did not establish the price schedules, did not review the reasonableness of the schedules, nor did it regulate the terms of fair trade contracts entered into pursuant to the regulatory scheme. As such, the Supreme Court found that the retail price maintenance scheme did not constitute valid state action but merely amounted to an attempt to render legal an otherwise unlawful private price-fixing arrangement. *See Midcal Aluminum,* 445 U.S. at 105-106.

In the case at bar, the Court can find no part of the determination of territorial lines which has been left to

private discretion. The only area in which the Territorial Acts allows private discretion is in the decision of a primary supplier to purchase or not to purchase the electric service facilities of a secondary service provider operating in the primary provider's assigned service area. Even as to this otherwise discretionary decision, the manner in which the discretion may be exercised is regulated by statute. *See* Ala. Code § 37-14-4. Otherwise, the manner in which service areas are established is mandated by statute and leaves no room for private action. Private parties may petition the Alabama Legislature if they wish to depart from the service areas so assigned, but agreements by private parties must be presented to the Legislature and approved by it before a party can implement such agreement. Ala. Code § 37-14-8. Although there is no explicit statutory mechanism for a continuing assessment as to whether the service territories established under the Territorial Acts continue to serve the public interest, the Court finds that the ability of private parties to petition for amendments to the Territorial Acts provides a continuing avenue of review of the service territories established under the Acts. As such, the Court finds that the anticompetitive actions alleged in the complaint are completely regulated by the Territorial Acts and that the Acts do not leave any room for private anticompetitive action and are "actively supervised" by the State of Alabama. Accordingly, the Court finds that the statutory scheme satisfies the second prong of the *Midcal Aluminum* test and therefore the actions complained of are valid state actions not subject to the Sherman Act.

D. CONCLUSION

Pursuant to the foregoing analysis, the Court concludes that the defendants' motions to dismiss are due to be granted in that the plaintiffs lack standing to assert antitrust claims for the division of territories outside of the sphere of operation allowed to them by the State of Alabama. Furthermore, plaintiffs' claims as to alleged

antitrust violations occurring within those spheres of operation are also due to be dismissed for failure to state a claim upon which relief can be granted since defendants' efforts to influence the passage of the Territorial Acts are protected under the Noerr-Pennington doctrine, and the defendants' actions taken pursuant to the Territorial Acts fall within the protection of the state-action doctrine.

Although the Court expresses no opinion as to whether the Territorial Acts represent wise state policy, it appears that the plaintiffs and defendants here fought a battle in the Alabama State Legislature, and that the plaintiffs lost in that arena. This law suit appears to be an effort to continue the same battle in the judicial arena. However, the Noerr-Pennington and state-action doctrines dictate that such battles remain in the legislative arena, and that decisions regarding state economic policy are for state legislatures rather than federal courts. This Court's holding says no more than that this Court will abide by the wisdom of such doctrines.

A separate order will be entered in accordance with this memorandum opinion.

DONE this 9th day of January, 1990.

/s/ Truman Hobbs
United States District Judge

[Filed Jan. 9, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 89-H-519-N

MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE; *et al.*,
Plaintiffs

vs.

ALABAMA POWER COMPANY; *et al.*,
Defendants

ORDER

In accordance with the attached Memorandum Opinion, the motion to intervene filed on behalf of the City of Lincoln is DENIED and defendants' motions to dismiss are GRANTED. Accordingly, this cause is DISMISSED, with prejudice.

DONE and ORDERED this 9th day of January, 1990.

/s/ Truman Hobbs
United States District Judge

APPENDIX F

The Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990):

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX G

The Clayton Act, 15 U.S.C. § 26 (1988):

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this action in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

CHAPTER 14

SERVICE TERRITORIES FOR ELECTRIC SUPPLIERS

ARTICLE 1

1984 ACT

§ 37-14.1. Legislative declarations, findings, etc.

The Legislature of the State of Alabama has investigated the economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service. Among its findings are the conclusion that with respect to retail electric sales, the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities. It is the further finding of the legislature that the existence of duplicate facilities for the furnishing of electricity at retail is not in the public interest because of the adverse impact which such duplication has on environmental and aesthetic values and on safety. It is therefore declared that the policy of the State of Alabama is to ensure effective, economical and orderly supply of electric service at retail to customers in the state and to avoid unnecessary duplication of facilities by electric suppliers for the furnishing of such services which would result in waste and in degradation of the environment. To accomplish these objectives, it is necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state including areas within present and

future corporate limits of municipalities in the state. (Acts 1984, No. 84-206, p. 314, § 1.)

§ 37-14-2. Definitions.

As used in this article, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise;

(1) ELECTRIC SUPPLIER. Any municipality, municipally-owned utility or other governmental entity, any cooperative, corporation, person, firm, association or other entity engaged in the business of supplying electric service at retail; provided, however, that a university, college or United States military base which distributes electricity shall not be deemed an electric supplier for the purpose of this article.

(2) ELECTRIC SERVICE AT RETAIL and RETAIL ELECTRIC SERVICE. Electric service furnished to a customer for ultimate consumption, but does not include wholesale electric service furnished by an electric supplier to another electric supplier for resale.

(3) PREMISES. The building, structure or facility to which electricity is being metered or is to be furnished and metered, including all meters on such building, structure or facility through which electricity is delivered or to be delivered. Such term shall also include any building, structure or facility which is reconstructed to replace a previously existing building, structure or facility of substantially the same size. In the event two or more buildings, structures, or facilities are located on one tract of land utilized by one customer, those buildings, structures, or facilities which are or will be served through a different meter shall be considered a separate premises.

(4) DISTRIBUTION LINE. An electric conductor which is operated at 35,000 volts or less, up to but not including the service drop. The service drop shall be that line from the last pole or last transformer on the distribution system to the premises.

(5) EXISTING DISTRIBUTION LINE. A distribution line in existence on January 1, 1984.

(6) PRIMARY ELECTRIC SUPPLIER. That electric supplier for each municipality existing on January 1, 1984 serving a plurality of the premises within the existing municipal limits to which service is actually being supplied and metered on January 1, 1984.

(7) SECONDARY ELECTRIC SUPPLIER. Any electric supplier within existing municipal limits which is not the primary electric supplier.

(8) EXISTING MUNICIPAL LIMITS. The corporate boundaries of any municipality as such boundaries existed on April 26, 1984.

(9) REPRODUCTION COST NEW LESS DEPRECIATION. The total investment that would be required by the electric supplier selling the facilities to duplicate the facilities to be sold at the time of such sale utilizing then current costs for all materials, supplies, labor, land and land rights, transportation, and miscellaneous direct and indirect expenses (including overhead, engineering and supervision costs that are normally capitalized) that would be required; the costs that would be required to obtain all necessary approvals and permits; and any other costs that would be appropriately applicable to the reproduction of the facilities, less an amount representing the straight line depreciation of such reproduction costs of any depreciable items over an assumed life of 30 years for electric distribution facilities for that period of time equal to the age of the items of the electric distribution facilities being transferred.

In no event, however, shall any item be depreciated more than 30 percent of the reproduction costs new of that item, so that in no event shall reproduction cost new less depreciation be less than 70 percent of the reproduction cost of such item.

(10) INDUSTRIAL CUSTOMER. A customer utilizing electric service at a premises at which the predominate activity is classified as mining, manufacturing, transportation, communication, electric, gas and sanitary services, or miscellaneous repair services in the Standard Industrial Classification Manual, Part I, Divisions B, D and E and Major Group 76 of Division I as published in 1972 by the Statistical Policy Division of the United States Office of Management and Budget. (Acts 1984, No. 84-206, p. 314, § 2.)

§ 37-14-3. Electric service outside existing municipal limits.

Except as otherwise provided in subdivisions (2), (3), and (4) of this section in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail electric service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier, even if the premises is within municipal limits and the electric supplier in whose assigned area the premises is located has no franchise from the municipality in which such premises is located. Assigned service areas outside existing municipal limits are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) of this section herein, each electric supplier is hereby assigned the sole obligation, in accordance

with its established rules and regulations, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984 whether or not a franchise has been granted by the municipality to the electric supplier to whom an area annexed has been assigned or to any other electric supplier), for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas of outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premmises falls shall provide the service. The above assignment shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in Section 37-14-4.

(2) Notwithstanding the above limitations stated in this section on construction of facilities to serve customers in areas outside existing municipal limits, an electric supplier may construct, operate and maintain facilities for provision of retail electric service to any new industrial customer not presently or previously served by another electric supplier, in an area outside existing municipal limits where the initial electric service requirement to such industrial customer, under normal operations and with a six-month growth period permitted from date of initial service, is equal to or greater than 2500 kilowatts

as measured over a 15-minute integrated period, upon written request to such electric supplier by the industrial customer to be served.

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned electric supplier shall provide retail electric service in any area outside existing municipal limits unless the premises to be so served is in the assigned service area of such electric supplier.

(4) The foregoing limitations shall not prevent an electric supplier from constructing electric facilities to serve its own premises used or to be used in its electric operations and other premises owned and occupied solely and exclusively by the electric supplier, or a municipality which appoints the governing body of such electric supplier or any agency of said municipality whose governing body is appointed by that municipality.

(5) Within nine months after April 26, 1984, all electric suppliers having existing distribution lines in each county in the state shall exchange maps of such facilities (as of January 1, 1984) located within the county. These maps shall be sufficiently detailed to permit the development of a definitive understanding of the electric supplier designated to serve under the guidelines set forth in subdivision (1) above. The legislature recognizes that the vast majority of existing distribution lines within existing municipal limits will have no effect on the assigned service areas determined in accordance with this section and electric suppliers may, at their option, elect not to show existing distribution lines which do not affect the assigned service areas.

(6) Neither (i) municipal annexations after April 26, 1984, nor (ii) the construction or removal of any facilities after January 1, 1984, nor (iii) the

purchase or sale of any facilities after April 26, 1984 consummated under the provisions of this article shall affect any rights or limitations regarding retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article. (Acts 1984, No. 84-206, p. 314, § 3.)

§ 37-14-4. Primary supplier's option to acquire facilities within existing municipal limts.

The primary electric supplier within each municipality shall, at its option have the right to acquire all distribution facilities of any secondary electric supplier used to supply retail electric service within the existing municipal limits and shall have the right to serve all premises within the existing municipal limits of such municipality subject to the following;

(1) The primary electric supplier must announce its intention to exercise its option in writing by registered or certified mail to the affected secondary suppliers within each municipality, addressed to the chief executive officer or manager of such secondary supplier, no later than nine months after April 26, 1984. Simultaneously with the delivery of the notice of exercise of its option by the primary electric supplier, the primary electric supplier shall deposit in escrow with a bank whose principal office is in Alabama and which has capital and surplus of not less than $5,000,000.00, or with any other escrow agent agreeable to the parties, the amount of $1,000.00 for each premises receiving electricity from the distribution facilities proposed to be purchased by the primary electric supplier on the date of the notice based on the primary electric supplier's good faith estimate of the number of premises involved. The secondary supplier shall, within seven

days after receipt of such notice, provide the actual number of premises involved, if different from that estimated by the primary supplier, and the escrow deposit made by the primary supplier shall be adjusted to accommodate any difference within seven days after such actual number of premises is supplied. The escrow agent shall be directed and authorized to invest the funds placed in escrow by the primary electric supplier in any investment directed by the primary electric supplier. The escrow agent is further authorized, upon election of the primary electric supplier making the deposit, to combine for investment any other deposit made by that depositor for the same purpose with respect to different facilities. The escrow agent shall render periodic accountings as to the escrow account to the primary electric supplier and the secondary electric supplier. If the purchase is consummated in accordance with this article, the funds shall be used to satisfy the purchase price of the facilities and other consideration to be paid by the primary electric supplier to the secondary electric supplier due as of the date of closing as determined under this section. Any portion of such fund in excess of the amount due to be paid to the secondary electric supplier on the date of closing shall be refunded to the primary electric supplier. If the amount due to be paid by the primary electric supplier to the secondary electric supplier under this section on the date of closing is in excess of the amount in the escrow account, the primary electric supplier shall pay the difference to the secondary electric supplier at closing. If the closing of the facilities is not consummated because of the failure of the primary electric supplier is to pursue its option under this article to purchase the distribution facilities, the escrow agent shall be instructed to deliver from the escrow fund to the secondary electric supplier, 14 days after the date

on which the primary electric supplier's rights to purchase the facilities expire unconsummated, the interest earned on the amount deposited from investment of such funds plus 10 percent of the amount originally deposited by the primary electric supplier. The balance of such escrow funds shall be returned to the primary electric supplier making the deposit.

(2) Unless otherwise agreed to by the secondary electric supplier and except as provided in subdivision (3) of this section, the primary electric supplier must offer to purchase all of the distribution facilities of the secondary electric supplier utilized by the secondary electric supplier for retail electric service within the existing municipal limits of any particular municipality. The primary and secondary electric supplier shall cooperate in the development of an inventory of such facilities and in the valuation of the facilities to be sold and other consideration to be paid in accordance with the principles set forth in subdivision (4) below. The secondary electric supplier shall also furnish to the primary electric supplier an accurate record of the revenues billed to customers of the secondary electric supplier located within the existing municipal limits of the municipality for the 12 months preceding the date of notice from the primary electric supplier of its exercise of the option to purchase facilities. The secondary electric supplier shall also provide the primary electric supplier with such information as is available to the secondary electric supplier concerning title to the distribution facilities. Within three months after initial notice has been given to the secondary electric supplier, if agreement has not been reached as to the inventory of facilities to be acquired and the value thereof or other consideration to be paid, the primary electric supplier shall be entitled to provide, in writing, is proposal listing the distribution facilities to be acquired, stating its estimate of the value and listing its evaluation of other consideration to be paid

in accordance with subdivision (4) hereof. Within 30 days after receipt of any such proposal, the secondary electric supplier shall state its objections, if any, to the matters contained in such proposal. If the secondary electric supplier fails to submit objections within such 30-day period, the proposal submitted by the primary electric supplier shall be conclusive as to the matters contained therein. If the secondary electric supplier does provide written objections, any dispute between the parties shall be resolved by mutual agreement or by the procedure set forth in Section 37-14-6.

(3) Each affected secondary supplier shall have the right to continue to provide retail electric service in accordance with its established rules and regulations, without time limitation, to any premises within the existing municipal limits of any municipality, the electric load of which (a) was 800 kilowatts or greater for three consecutive months during the three years prior to January 1, 1984; or (b) is served from a substation or step-down transformer from 44 kilovolts or higher which is devoted exclusively to service to the particular premises.

(4) The reproduction cost new, less depreciation, of the facilities to be acquired shall be determined as of 30 days prior to the date established for the closing of the acquisition. The faclities transferred shall be conveyed by warranty deed, "as is, where is," without warranty, express or implied, as to the condition of the facilities. In addition to such reproduction costs, the primary electric supplier shall (i) reimburse the secondary electric supplier the costs to the secondary electric supplier for removal of its meters which are excluded from the definition of distribution facilities in Section 37-14-5(i); (ii) reimburse the secondary electric supplier the cost of constructing any necessary facilities to reintegrate the system of the secondary electric supplier after detaching the portion to be

sold to the primary electric supplier such that the reinegrated system and supply of power and energy thereto in those areas that will continue to be served by the secondary electric-supplier will be as adequate and dependable as exists prior to the sale; such reimbursement to include the cost of removal and to be reduced by the salvage value of any facilities removed by the secondary electric supplier; (iii) reimburse the secondary electric supplier its original cost depreciated for facilities of the secondary electric supplier excluded from the definition of distribution facilities under Section 37-14-5(ii) in which case the primary electric supplier shall take title to such facilities or, at the option of the secondary electric supplier, reimburse the secondary electric supplier the cost of removal, in which case the secondary electric supplier shall retain title; and (iv) pay to any wholesale supplier of the secondary electric supplier (or if the secondary electric supplier does not purchase its electric supply at wholesale then to the secondary electric supplier) the original cost depreciated of any facilities other than distribution facilities, as described in Section 37-14-5(iii), rendered useless by such acquisition of the distribution system of the secondary electric supplier; provided, however, at the election of the owner of such facilities, the payment to be made shall be the cost to such owner of relocating such facilities. The primary electric supplier shall pay the secondary electric supplier the amount determined pursuant to this chapter for reproduction cost new less depreciation of the distribution facilities together with the amount due under subdivision (4)(i), (ii), (iii) and (iv) immediately upon transfer of title to the facilities. In addition, to compensate the secondary electric supplier for the loss of future revenues from presently served or future developing premises, and not as compensation for the sale of its facilities, the primary electric supplier shall pay to the secondary electric supplier an amount

equal to two and one-half times the total revenue from electric sales derived by the secondary electric supplier from customers within the existing municipal limits during the 12 months prior to the date notice is given by the primary electric supplier of its election to purchase the facilities. This amount shall be paid in 10 equal annual installments beginning on the date the sale of facilities is consummated.

(5) Each affected secondary electric supplier shall have the right to continue to provide service to premises located within the existing municipal limits until such time as the primary electric supplier exercises its option to purchase and until such purchase is consummated pursuant to the procedures established herein. In the event the electric facilities of the secondary electric supplier are subject to an option to purchase as provided herein, the secondary electric supplier shall have the right to continue to maintain such facilities and retail electric service until the primary electric supplier purchases the facilities of the secondary electric supplier; and in the event the primary electric supplier does not exercise the option to purchase the facilities of the secondary electric supplier as provided in this section, the secondary electric supplier shall have the right to continue to maintain its facilities and service and make extensions to serve new premises within the existing municipal limits under the standards set forth in Section 37-14-3, notwithstanding the lack of a franchise from the municipality in which such premises are located. The primary electric supplier shall be prohibited from extending service to such new or existing premises. (Acts 1984, No. 84-206, p. 314, § 4.)

§ 37-14-5. Distribution facilities.

The term "distribution facilities" as used in Section 37-14-4 shall include distribution lines and other facilities constructed or installed by the electric supplier in the area

to which the purchase option applies, for the rendering of retail electric service except (i) meters, (ii) distribution transformers of voltages not compatible with those of the acquiring electric supplier, (iii) substations of such a voltage that are not compatible with operations of the acquiring electric supplier, (iv) facilities for provision of service by the secondary supplier to premises the electric load of which such secondary supplier may continue to serve under Section 37-14-4(3), and (v) such facilities designated by the supplier as necessary to continue its service in an area not subject to the purchase option herein or to serve such supplier's own load. (Acts 1984, No. 84-206, p. 314, § 4.)

§ 37-14-6. Resolution of disputes regarding purchases of facilities, etc.

In the event that a dispute should arise between two or more electric suppliers in connection with the purchase of distribution facilities under Section 37-14-4, the primary electric supplier involved may petition the circuit court for the judicial circuit in which the distribution facilities to be purchased are located to determine such matters as are in dispute between the parties. If the purchase of distribution facilities proposed to be purchased under the notice described in Section 37-14-4(1) is not closed within six months after the date of the notice and if the primary electric supplier has not filed a petition for resolution of disputes in the appropriate court within 14 days after six months from the date of the notice, then the primary electric supplier's exercise of the option shall be void and of no further effect and the primary electric supplier shall have no right to purchase such facilities thereafter.

If a petition is filed with the appropriate circuit court, the sale of the facilities shall be closed within 90 days from the date of the issuance of a final order of the circuit court (or from the date of the decision of an appellate court if such matter is appealed). If the closing is not completed within such 90 days due to the failure of the

primary electric supplier to close for any reason, the primary electric supplier's exercise of the option shall be void and it shall thereafter have no further right to purchase the distribution facilities covered by the notice. (Acts 1984, No. 84-206, p. 314, § 5; Acts 1984, 2nd Ex. Sess. No. 85-45, p. 68, § 1.)

§ 37-14-7. Applicability of certain provisions of Title 37.

With respect to any sale of facilities consummated pursuant to the provisions of this article, the provisions of Section 37-1-50 shall not be applicable to such sale or to the cessation by a utility of rendering service from such facilities involved in such sale. To the extent of any conflict between this article and the provisions of Section 37-4-60 through Section 37-4-65, the provisions of this article shall govern and control. (Acts 1984, No. 84-206, p. 314, § 6.)

§ 37-14-8. Exemptions.

The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Coosa Valley Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Lincoln, Alabama.

(7) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 2, 1984 regarding electric service areas in Ozark, Alabama.

(8) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 2, 1984 regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(9) Agreement among Covington Electric Cooperative, the City of Elba, Alabama and the City of Elba Water and Electric Board dated as of January 2, 1984 regarding electric service in and around Elba, Alabama.

(10) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Flomaton and Brewton, Alabama.

(11) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983 regarding electric service in areas around Troy, Alabama.

(12) Agreement between the Utilities Board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

Subsequent to April 26, 1984, suppliers shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers, affected by the agreement respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed and approved by the legislature and the legislature's approval has been evidenced by an amendment to this section of the article enacted prior to July 1, 1985. (Acts 1984, No. 84-206, p. 314, § 7.)

§ 37-14-9. Action for injunction or damages for violation of article authorized; procedure.

(a) If an electric supplier commences construction of facilities in violation of the provisions of this article, any aggrieved electric supplier which is designated herein as the entity to provide such service (the "aggrieved electric supplier") may petition the circuit court for the judicial circuit in which the facilities are being constructed by the offending electric supplier for an injunction to prevent the offending electric supplier from completing the facilities for provision of the retail electric service in question.

(b) If an electric supplier believes that another electric supplier has already rendered or extended electric service at retail to a premise which was designated to be served by the aggrieved electric supplier, the aggrieved electric supplier shall give notice in writing to the offending electric supplier of the potential violation of this

article. The offending electric supplier shall have 45 days to determine whether it is in violation of this article. If the offending electric supplier concludes that it is violating this article, it may cease rendering and extending electric service at retail to the premises in question at the time and upon the schedule designated in writing by the aggrieved electric supplier and the offending electric supplier shall have no liability to the aggrieved electric supplier for violation of this article. If the offending electric supplier does not cease rendering service and remove its distribution facilities within the 45-day period or within such longer period designated by the aggrieved electric supplier, the aggrieved electric supplier may file suit in the circuit court for the judicial circuit in which the rendition or extension occurs to enjoin the offending electric supplier from continuing such rendition or extension and for damages. If a violation of this article is proved, the offending electric supplier shall (1) remove its facilities constructed for the rendition of retail electric service to the premises at the time and upon the schedule designated in writing by the aggrieved electric supplier; and (2) pay to the aggrieved electric supplier 25 percent of the gross revenues derived by the offending electric supplier from the sale of electric service in violation of this article from and after the date that is 45 days after the date on which the notice of violation was given. In addition, the offending electric supplier shall reimburse the aggrieved electric supplier for all witness fees, court costs, reasonable attorneys fees and other expenses incurred in any litigation to enforce the aggrieved electric supplier's rights under this article. If the violation is not proved, the aggrieved electric supplier shall reimburse the offending electric supplier for all witness fees, court costs, reasonable attorneys fees and other costs incurred in the litigation. All actions or proceedings for injunction or for damages shall be brought within three years after the offending electric supplier first renders or extends electric service at retail in violation of this article. (Acts 1984, No. 84-206, p. 314, § 8.)

§ 37-14-10. Authorization for validation, etc., of provisions of article; procedure.

In order to foster and encourage the underlying policies of this article and to assure that sales and purchases of distribution facilities, and other transactions and actions authorized or allowed by this article may be conducted in good faith with a knowledge of the consequence and the validity thereof and further, to assure that irrevocable commitments are not made in the implementation of the provisions of this article without the assurance of their legality and validity, the following judicial review process is hereby authorized and it is declared to be the legislative intent that the provisions of this statute be judicially reviewed and validated pursuant to the procedure set forth herein and that the circuit court enter a judgment in accordance with the procedure set forth herein. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-11. Judicial determination of legality, etc., of article—Filing of complaint.

At any time subsequent to April 26, 1984, an affected secondary electric supplier whose distribution facilities are subject to the provisions of this article and whose facilities may be purchased pursuant to this article by a primary electric supplier may, in its discretion before the closing of such purchase, seek judicial determination of the legality and validity of such purchase of facilities pursuant to the provisions of this article, and all other questions of the legality or validity of the provisions of this article. Such judicial determination shall be had upon the filing of a complaint against the citizens of the State of Alabama and against the affected primary electric supplier. Such complaint shall be filed in the circuit court of Montgomery County, Alabama which shall have exclusive venue for the determination of all questions of the legality and validity of the provisions of this article. The filing of any such complaint shall stay the dates

established for the closing of all sales of facilities pursuant to the provisions of this article until, with respect to each situation in which intent to exercise the option to purchase has been announced, a date is established by the mutual agreement of the affected primary and secondary electric supplier, which date shall not be in excess of 90 days after the final resolution of the action to determine the legality and validity of the proposed transaction as well as the legality and validity of this article, including any appeal therefrom. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-12. Judicial determination of legality, etc., of article—Contents of complaint; order and notice of hearing to show cause; intervention.

(a) The complaint by appropriate allegations, references and/or exhibits shall briefly state the following: the authority for the purchase and sale of distribution facilities and other transactions and restrictions under this article; the nature of any franchise heretofore issued by a municipality which will be affected; a general description of restrictions imposed by this article; the proposed date when the purchase and sale or other transaction is to be effective, and the impact which such restrictions and sale shall have on the parties and the public.

(b) The judge of said court shall, upon the filing and presentation of said complaint, issue an order against the citizens of the state, and other defendants requiring them to show cause, at a time and place to be designated in said order, which time shall be not less than 35 days nor more than 56 days after the issuance of such order, and which place shall be within Montgomery County, why said purchase and sales and the other transactions and restrictions and all other proceedings under this article should not be validated and confirmed.

(c) The Attorney General of the State of Alabama shall be the designated representative of the citizens of

the State of Alabama and shall appear on their behalf for all purposes in any proceeding brought pursuant to this section.

(d) Prior to the hearing of said cause, the clerk of said court shall publish, in a newspaper of general circulation published in Montgomery County, once each week for at least three weeks before the hearing, the first publication which would be at least 21 days before such hearing, a notice addressed to the citzens of the State of Alabama requiring them, at the time and place specified in the order providing for the hearing of such case, to show cause, if any there be, why said purchase and sale or other transaction and restriction that may be referred to in the complaint should not be validated and confirmed. In addition, the clerk of said court shall also publish notice to the citizens of the state in newspapers of general circulation customarily published not less often than five days during each calendar week in the Cities of Andalusia, Birmingham, Dothan, Florence, Gadsden, Huntsville, Mobile, Selma and Tuscaloosa. By the publication of such notice, all citizens of the state shall become parties defendant to such proceedings, and the court shall have jurisdiction of them the same as if each of them were named individually as party defendants in said complaint and personally served with process.

(e) In addition to the publication and notice set forth in subsection (d) of this section, the clerk of the Circuit Court in Montgomery County shall also cause a summons and complaint to be served upon the Attorney General of the State of Alabama as representative of all citizens of the State of Alabama and upon all other parties named as defendants in the action.

(f) The plaintiff shall certify to the court, in writing, with an attached list, that it has mailed a copy, by certified mail, return receipt requested, of the complaint filed in the action to each other electric supplier in the state, as defined in this article. Said notice to said electric sup-

pliers shall inform them of the time and place of the hearing and shall contain a copy of the complaint filed herein. The notice required by this paragraph shall be mailed not less than 21 days prior to the date set for the hearing.

(g) Each electric supplier which receives notice pursuant to the provisions set forth in subsection (f) above, or which receives notice in any manner whatsoever of this action, may petition the court, as a matter of right, to intervene in said action and to participate in the hearing provided for in subsection (f) above.

(h) The failure of any electric supplier, municipality and/or governmental unit to exercise the right to intervene and participate in the hearing shall be deemed a waiver of any right such electric supplier, municipality or governmental unit may have to participate and to challenge, contest or otherwise question the validity of any purchase, sale and/or transaction made or proposed to be made pursuant to this article or to challenge the validity of any of the provisions of this article. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-13. Judicial determination of legality, etc., of article—Hearing; entry of judgment; appeals.

At the time and place designated in said order, the judge of said circuit court shall proceed to hear and determine all questions of law and of fact in said civil action, and he shall make such order, or orders, as to the proceedings in said civil action as will best preserve and protect the interests of all parties and to enable him to enter a final judgment with the least possible delay. The final judgment shall find the facts specially and shall state separately the judge's conclusions with regard to any and all legal issues raised with regard to any of the provisions of this article and proposed purchase and sale of distribution facilities and other transactions and restrictions under this article, together with other matters

raised in the complaint, and shall state the judge's conclusions of law thereon. Any citizen of the state may appear in such proceedings, either personally or by attorney, and any party thereto, whether plaintiff, defendant or intervenor, dissatisfied with the judgment of the court may appeal therefrom to the Supreme Court of Alabama in accordance with the Alabama Rules of Appellate Procedure. Such appeal shall take priority in the supreme court over all other cases therein pending, except petitions for writs of habeas corpus. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-14. Judicial determination of legality, etc., of article—Finality of judgment.

If the circuit court shall enter a judgment validating and confirming the propriety of the provisions of this article and purchases and sales, other transactions and restrictions under this article and no appeal shall be taken within the time prescribed within the Alabama Rules of Appellate Procedure; or, if an appeal is taken and the judgment validating the provisions of this article and such purchases and sales, other transactions and restrictions shall be affirmed by the supreme court; or, if the circuit court shall render a judgment refusing to validate and confirm the provisions of this article and/or the purchase and sale, other transactions or restrictions pursuant to this article, and on appeal such judgment shall be reversed by the supreme court (in which case the supreme court shall issue its mandate to the circuit court requiring it to enter a judgment validating the provisions of this article and confirming the proposed purchase, sale, or other transactions or restrictions), the judgment of the circuit court validating and confirming the provisions of this article and the purchase and sale, other transactions and restrictions, shall be forever conclusive as to the validity of the provisions of this article, and shall be conclusive as to the validity of any purchase and sale,

other transactions or restrictions or extension of electric service rendered pursuant to this article as against all citizens of the state, electric suppliers and municipalities and the other governmental units. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-15. Judicial determination of legality, etc., of article—Costs of proceedings.

The court costs in any proceeding brought under this article shall be paid by the electric supplier commencing the action. (Acts 1984, No. 84-206, p.314, § 9.)

§ 37-14-16. Applicability of article.

No action shall be commenced challenging the legality or validity of the provisions of this article, or the legality or validity of a purchase and sale transaction or restriction under this article where the legality or validity of this article is in controversy in any prior pending civil action or proceeding in any court or has been determined in any such action. In the event any action is pending in any circuit in the state which raises or challenges the legality or validity of any provision of this article at the time an action is filed under this section, such pending action shall be transferred to the Circuit Court of Montgomery County and shall be consolidated with the action filed pursuant to this section and the consolidated proceeding shall be adjudicated in accordance with the procedures set forth in this article. (Acts 1984, No. 84-206, p. 314, § 9.)

§ 37-14-17. Severability.

The provisions of this article are not severable. If any part of this article is declared invalid under the constitution or laws of this state, such declaration shall render invalid all parts which remain. Notwithstanding such invalidity, action taken by any party in conformity with the provisions of this article shall be considered lawful

actions by such party; provided, however, any electric service rendered which would have been illegal or unlawful or violative of any contractual provision absent this article shall be terminated and the facilities shall be removed following any determination of the invalidity of this article. (Acts 1984, No. 84-206, p. 314, § 9.)

APPENDIX I

ARTICLE 2

1985 ACT

§ 37-14-30. Declaration of findings and policy; relationship to 1984 act.

The Legislature of the State of Alabama has investigated the economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service. It has been determined that with respect to retail electric sales, the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities. It is the further finding of the legislature that the existence of duplicate facilities for the furnishing of electricity at retail is not in the public interest because of the adverse impact which such duplication has on environmental and aesthetic values and on safety. It is therefore declared that the policy of the State of Alabama is to ensure effective, economical and orderly supply of electric service at retail to customers in the state and to avoid unnecessary duplication of facilities by electric suppliers for the furnishing of such services which would result in waste and in degradation of the environment. To accomplish these objectives, it is necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state including areas within the corporate limits of municipalities in the state. The rules established herein for elimination of duplication of electric facilities may result in the requirement that a municipality grant consent to service by a particular electric supplier if the municipality desires that such area be supplied with electric service. Such rules are deemed essential by the legis-

lature in the exercise of police power of the state to eliminate wasteful duplication of electric facilities. Contracts entered into by municipalities for the purpose of securing loans pursuant to Section 11-50-11, or pursuant to any other provision of law, which restrict the grant by the municipality of a municipal franchise or consent shall not be interpreted as applying to any area of the municipality other than the areas of the city in which the municipal electric system was located on May 20, 1985. The determinations and statements of policy set forth above are similar to those contained in Act No. 84-206 of the Alabama Legislature, regular session, 1984. Act No. 84-206 was declared invalid by the Federal District Court for the Middle District of Alabama. It is the conclusion of the legislature that such determination was improper and should be reversed, leaving valid Act No. 84-206. In the event Act No. 84-206 is hereafter declared to be valid on appeal of the decision of the federal district court, it is the intent of the legislature that Act No. 84-206 not be repealed by this article but shall be considered valid and binding in lieu of the provisions of this article. It is the intent of the legislature that this article establish rules for elimination of duplication of facilities which shall apply to lines constructed after January 1, 1984. It has been determined that no electric supplier should be permitted to retain facilities built inconsistent with the provisions of Act No. 84-206, even though, if Act No. 84-206 is not reinstated, such construction was not prohibited by law. It has been determined further that compensation for facilities should be made in accordance with the provisions of subdivision (6) of Section 37-14-32. (Acts 1985, No. 85-645, p. 983, § 1.)

§ 37-14-31. Definitions.

As used in this article the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise;

(1) ELECTRIC SUPPLIER. Any municipality, municipally-owned utility or other governmental entity, any cooperative, corporation, person, firm, association or other entity engaged in the business of supplying electric service at retail; provided, however, that no person or entity, including the Tennessee Valley Authority, who may not be lawfully regulated by the state by virtue of powers granted by the laws of the United States which prevail over Alabama statutes, nor any university, college or United States agency which distributes electricity at retail shall be deemed an electric supplier for the purpose of this article.

(2) ELECTRIC SERVICE AT RETAIL and RETAIL ELECTRIC SERVICE. Electric service furnished to a customer for ultimate consumption, but does not include wholesale electric service furnished by an electric supplier to another electric supplier for resale.

(3) PREMISES. The building, structure or facility to which electricity is being metered or is to be furnished and metered, including all meters on such building, structure or facility through which electricity is delivered or to be delivered. Such term shall also include any building, structure or facility which is reconstructed to replace a previously existing building, structure or facility of substantially the same size. In the event two or more buildings, structures, or facilities are located on one tract of land utilized by one customer, those buildings, structures, or facilities which are or will be served through a different meter shall be considered a separate premises.

(4) DISTRIBUTION LINE. An electric conductor which is operated at 35,000 volts or less, up to but not including the service drop. The service drop shall be that line from the last pole or last transformer on the distribution system to the premises.

(5) EXISTING DISTRIBUTION LINE. A distribution line in existence on January 1, 1984.

(6) PRIMARY ELECTRIC SUPPLIER. That electric supplier for each municipality existing on January 1, 1984 serving a plurality of the premises within the existing municipal limits to which service is actually being supplied and metered on January 1, 1984.

(7) SECONDARY ELECTRIC SUPPLIER. Any electric supplier serving within existing municipal limits which is not the primary electric supplier.

(8) EXISTING MUNICIPAL LIMITS. The corporate boundaries of any municipality as such boundaries existed on April 26, 1984.

(9) MUNICIPAL CONSENT or CONSENT OF THE MUNICIPALITY. The approval by a city or town pursuant to Section 220 of the Alabama Constitution of the use of the streets, avenues, alleys or public places of the city or town evidenced by appropriate action of the proper authorities of the city or town.

(10) REPRODUCTION COST NEW LESS DEPRECIATION. The total investment that would be required by the electric supplier selling the facilities to duplicate the facilities to be sold at the time of such sale utilizing then current costs for all materials, supplies, labor, land and land rights, transportation, and miscellaneous direct and indirect expenses (including overhead, engineering and supervision costs that are normally capitalized) that would be required; the costs that would be required to obtain all necessary approvals and permits; and any other costs that would be appropriately applicable to the reproduction of the facilities, less an amount representing the straight line depreciation of such reproduction costs of any depreciable items over an assumed life of 30 years for electric distribution facilities for that period of time equal to the age of the items of the electric distribution facilities being transferred. In no event, however, shall any item be depreciated more than 30 percent of the reproduction costs new of that item,

so that in no event shall reproduction cost new less depreciation be less than 70 percent of the reproduction cost of such item.

(11) INDUSTRIAL CUSTOMER. A customer utilizing electric service at a premises at which the predominate activity is classified as mining, manufacturing, transportation, communication, electric, gas and sanitary services, or miscellaneous repair services in the Standard Industrial Classification Manual, Part I, Division B, D and E and Major Group 76 of Division I as published in 1972 by the statistical policy division of the United States Office of Management and Budget.

(12) NEW INDUSTRIAL CUSTOMER. An industrial customer who constructs a new premises on a site not previously occupied by an industrial customer. (Acts 1985, No. 85-645, p. 983, § 2.)

§ 37-14-32. Electric service outside existing municipal limits.

Except as otherwise provided in subdivisions (2), (3), (4) and (6) but notwithstanding any other provision of this article, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier. Assigned service areas outside existing municipal limits are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) herein, each electric supplier is hereby granted a legislative franchise and assigned the sole obligation, in areas outside existing municipal limits and within existing municipal limits to the extent the

standards of this section are made applicable by subdivision (a)(5) of Section 37-14-33, for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier (including areas annexed to municipalities on or after April 26, 1984 whether or not a municipal franchise has been granted to the electric supplier to whom an area annexed has been assigned or to any other electric supplier) such legislative franchise being subject, nevertheless, to consent of the municipality with respect to any construction or operation for which a municipal consent is required. Electric service shall be rendered by the electric supplier to whom responsibility has been assigned in accordance with its established rules and regulations. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises fall shall provide the service. The above prohibitions and assignments shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in Section 37-14-33 subject, nevertheless, to the consent of the municipality with respect to any construction or operation for which a municipal consent is required.

(2) Notwithstanding the above limitations stated in this section on construction of facilities to serve customers in areas outside existing municipal limits,

an electric supplier may construct, operate and maintain facilities for provision of retail electric service to any new industrial customer not presently or previously served by another electric supplier, in an area outside existing municipal limits where the initial electric service requirement to such industrial customer, under normal operations and with a six month growth period permitted from date of initial service, is equal to or greater than 2500 kilowatts as measured over a 15 minute integrated period, upon written request to such electric supplier by the industrial customer to be served.

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned electric supplier shall provide retail electric service in any area outside existing municipal limits unless the premises to be so served is in the assigned service area of such electric supplier.

(4) The foregoing limitations shall not prevent an electric supplier from constructing electric facilities to serve its own premises used or to be used in its electric operations and other premises owned and occupied solely and exclusively by the electric supplier, or a municipality which appoints the governing body of such electric supplier or any agency of said municipality whose governing body is appointed by that municipality.

(5) Within nine months after May 20, 1985, all electric suppliers having existing distribution lines in each county in the state shall exchange maps of such facilities (as of January 1, 1984) located within the county. These maps shall be sufficiently detailed to permit the development of a definitive understanding of the electric supplier designated to serve under the guidelines set forth in subdivision (1) above. The legislature recognizes that the vast majority of existing distribution lines within existing municipal limits

will have no effect on the assigned service areas determined in accordance with this section and electric suppliers may, at their option, elect not to show existing distribution lines which do not affect the assigned service areas.

(6) In the event an electric supplier has constructed, after January 1, 1984 and prior to May 20, 1985, electric distribution facilities to provide electric service at retail to a premises located in the assigned service area of another electric supplier, the electric supplier in whose assigned service area the facilities are located shall, at its option, have the right to acquire such facilities. Such option shall be exercised in the same manner, at the same time, and shall be subject to the same compensation provisions, specified in Section 37-14-33; provided, however, no escrow of funds shall be required in connection with such purchase. If the electric supplier in whose area the electric distribution facilities are located fails to exercise its option to acquire such facilities, the owner of such facilities shall be authorized to maintain such facilities to provide service to premises being served as of May 20, 1985; but shall not extend service from such faciliites to new premises in violation of the principles set forth in this section.

(7) Neither (i) municipal annexations after April 26, 1984, nor (ii) the construction or removal of any facilities after January 1, 1984, nor (iii) the purchase or sale of any facilities after May 20, 1985, consummated under the provisions of this article shall affect any rights or limitations regarding retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article. (Acts 1985, No. 85-645, p. 983, § 3.)

§ 37-14-33. Retail electric service within municipalities.

(a) *Primary supplier's option to acquire facilities within existing municipal limits.*—The primary electric supplier within each municipality shall, at its option, have the right to acquire all distribution facilities of any secondary electric supplier used to supply retail electric service within the existing municipal limits and shall have the right to serve all premises within the existing municipal limits of such municipality subject to the provisions of subdivisions (a)(1) through (a)(5). Except as authorized in this section, no secondary electric supplier shall extend facilities to serve existing or new premises within the existing municipal limits of the municipality.

(1) The primary electric supplier must announce its intention to exercise its option to acquire the distribution facilities of secondary electric suppliers by giving written notice by registered or certified mail to the affected secondary suppliers within each municipality, addressed to the chief executive officer or manager of such secondary supplier, no later than 30 days after May 20, 1985. This notice shall be referred to in this article as the "initial notice of intent to purchase." Within nine months after May 20, 1985, the primary electric supplier shall deposit in escrow with a bank whose principal office is in Alabama and which has capital and surplus not less than $5,000,000.00, or with any other escrow agent agreeable to the parties, the amount of $1,000.00 for each premises receiving electricity from the distribution facilities proposed to be purchased by the primary electric supplier on the date of the escrow notice defined below, based on the primary electric supplier's good faith estimate of the number of premises involved. Simultaneously with such deposit, the primary electric supplier shall give notice by registered or certified mail to the affected secondary supplier of the amount and date of the deposit. This notice shall be referred to in this article as the "escrow notice."

Failure to make the escrow deposit within nine months after May 20, 1985, shall constitute a forfeiture of the option granted to the primary supplier hereunder, but such failure to make such escrow deposit shall not create any liability of the primary supplier to the secondary supplier. In such event, provision of electric service shall be governed by the rules set forth in subdivision (a)(5). The secondary supplier shall, within seven days after receipt of the escrow notice, provide the actual number of premises involved, if different from that estimated by the primary supplier, and the escrow deposit made by the primary supplier shall be adjusted to accommodate any difference within seven days after such actual number of premises is supplied. The escrow agent shall be directed and authorized to invest the funds placed in escrow by the primary electric supplier in any investment directed by the primary electric supplier. The escrow agent is further authorized, upon election of the primary electric supplier making the deposit, to combine for investment any other deposit made by that depositor for the same purpose with respect to different facilities. The escrow agent shall render periodic accountings as to the escrow account to the primary electric supplier and the secondary electric supplier. If the purchase is consummated in accordance with this article, the funds shall be used to satisfy the purchase price of the facilities and other consideration to be paid by the primary electric supplier to the secondary electric supplier due as of the date of closing as determined under this section. Any portion of such fund in excess of the amount due to be paid to the secondary electric supplier on the date of closing shall be refunded to the primary electric supplier. If the amount due to be paid by the primary electric supplier to the secondary electric supplier under this section on the date of closing is in excess of the amount in the escrow account, the primary electric supplier shall pay the difference to

the secondary electric supplier at closing. If the closing of the facilities is not consummated because of the failure of the primary electric suppliers to pursue its option under this article to purchase the distribution facilities, the escrow agent shall be instructed to deliver from the escrow fund to the secondary electric supplier, 14 days after the date on which the primary electric supplier's rights to purchase the facilities expire unconsummated, the interest earned on the amount deposited from investment of such funds plus 10 percent of the amount originally deposited by the primary electric supplier. The balance of such escrow funds shall be returned to the primary electric supplier making the deposit.

(2) Unless otherwise agreed to by the secondary electric supplier and except as provided in subdivision (a)(3), the primary electric supplier must offer to purchase all of the distribution facilities of the secondary electric supplier utilized by the secondary electric supplier for retail electric service within the existing municipal limits of any particular municipality. The primary and secondary electric supplier shall cooperate in the development of an inventory of such facilities and in the valuation of the facilities to be sold and other consideration to be paid in accordance with the principles set forth in subdivision (a)(4) below. The secondary electric supplier shall also furnish to the primary electric supplier an accurate record of the revenues billed to customers of the secondary electric supplier located within the existing municipal limits of the municipality for the 12 months preceding the date of the escrow notice from the primary electric supplier of its exercise of the option to purchase facilities. The secondary electric supplier shall also provide the primary electric supplier with such information as is available to the secondary electric supplier concerning title to the distribution facilities. Within three months after the escrow no-

tice has been given to the secondary electric supplier, if agreement has not been reached as to the inventory of facilities to be acquired and the value thereof or other consideration to be paid, the primary electric supplier shall be entitled to provide, in writing, its proposal listing the distribution facilities to be acquired, stating its estimate of the value and listing its evaluation of other consideration to be paid in accordance with subdivision (a)(4) hereof. Within 30 days after receipt of any such proposal, the secondary electric supplier shall state its objections, if any, to the matters contained in such proposal. If the secondary electric supplier fails to submit objections within such 30 day period, the proposal submitted by the primary electric supplier shall be conclusive as to the matters contained therein. If the secondary electric supplier does provide written objections, any dispute between the parties shall be resolved by mutual agreement or by the procedure set forth in Section 37-14-34.

(3) Each affected secondary supplier shall have the right to continue to provide retail electric service in accordance with its established rules and regulations, without time limitation, to any premises within the existing municipal limits of any municipality, the electric load of which a. was 800 kilowatts or greater for three consecutive months during the three years prior to January 1, 1984; or b. is served from a substation or step-down transformer from 44 kilovolts or higher which is devoted exclusively to service to the particular premises.

(4) The reproduction cost new, less depreciation, of the facilities to be acquired shall be determined as of 30 days prior to the date established for the closing of the acquisition. The facilities transferred shall be conveyed by warranty deed, "as is, where is", without warranty, express or implied, as to the condi-

tion of the facilities. In addition to such reproduction costs, the primary electric supplier shall

a. Reimburse the secondary electric supplier the costs to the secondary electric supplier for removal of its meters which are excluded from the definition of distribution facilities in item (1) of subsection (b);

b. Reimburse the secondary electric supplier the cost of constructing any necessary facilities to reintegrate the system of the secondary electric supplier after detaching the portion to be sold to the primary electric supplier such that the reintegrated system and supply of power and energy thereto in those areas that will continue to be served by the secondary electric supplier will be as adequate and dependable as exists prior to the sale; such reimbursement to include the cost of removal and to be reduced by the salvage value of any facilities removed by the secondary electric supplier;

c. Reimburse the secondary electric supplier its original cost depreciated for facilities of the secondary electric supplier excluded from the definition of distribution facilities under item (2) of subsection (b) in which case the primary electric supplier shall take title to such facilities or, at the option of the secondary electric supplier, reimburse the secondary electric supplier the cost of removal, in which case the secondary electric supplier shall retain title; and

d. Pay to any wholesale supplier of the secondary electric supplier (or if the secondary electric supplier does not purchase its electric supply at wholesale then to the secondary electric supplier) the original cost depreciated of any facilities other than distribution facilities,

as described in item (3) of subsection (b), rendered useless by such acquisition of the distribution system of the secondary electric supplier; provided, however, at the election of the owner of such facilities, the payment to be made shall be at the cost to such owner of relocating such facilities.

The primary electric supplier shall pay the secondary electric supplier the amount determined pursuant to this article for reproduction cost new less depreciation of the distribution facilities together with the amount due under paragraphs a, b, c, and d of this subdivision immediately upon transfer of title to the facilities. In addition, to compensate the secondary electric supplier for the loss of future revenues from presently served or future developing premises, and not as compensation for the sale of its facilities, the primary electric supplier shall pay to the secondary electric supplier an amount equal to two and one-half times the total revenue from electric sales derived by the secondary electric supplier from customers within the existing municipal limits during the 12 months prior to the date escrow notice is given by the primary electric supplier of its election to purchase the facilities. This amount shall be paid in 10 equal annual installments beginning on the date the sale of facilities is consummated.

(5) Each affected secondary electric supplier shall have the right to continue to provide service to premises located within the existing municipal limits until such time as the primary electric supplier exercise its option to purchase and until such purchase is consummated pursuant to the procedures established herein. In the event the electric facilities of the secondary electric supplier are subject to an option to purchase as provided herein, the secondary electric supplier shall have the right to continue to maintain such facilities

and retail electric service until the primary electric supplier purchases the facilities of the secondary electric supplier. Until the purchase of the facilities of the secondary supplier is consummated, the secondary supplier shall have the right, subject to consent of the municipality with respect to any construction or operation for which a municipal consent is required, to provide service to any new premises located closer to the existing distribution lines of the secondary electric supplier than to those of the primary electric supplier or any other electric supplier except for new industrial customers having a size equivalent to that specified in subdivision (2) of Section 37-14-32, if such new industrial customer has requested service from the primary electric supplier. The compensation required for the purchase of the secondary electric supplier's facilities, by the primary electric supplier of facilities built by the secondary electric supplier pursuant to the previous sentence shall be limited to the reproduction costs new, less depreciation, of facilities constructed to serve such new premises and the primary electric supplier shall not be required to pay any of the other costs specified in subdivision (a)(4). In the event the primary electric supplier does not exercise the option to purchase the facilities of the secondary electric supplier as provided in this section, the primary electric supplier and any other electric supplier shall be prohibited from extending its facilities for service to existing premises being served by the secondary electric supplier or to new premises located closer to the existing distribution lines of the secondary electric supplier than to the existing distribution lines of the primary electric supplier or any other electric supplier under the standards set forth in Section 37-14-32. The secondary electric supplier shall have the right to continue to maintain its facilities and service and make extensions to serve new premises within the existing municipal limits under the standards set forth

in Section 37-14-32, notwithstanding the lack of a municipal franchise from the municipality in which such premises are located, subject, nevertheless, to consent of the municipality for construction or use of the streets, avenues, alleys, or public ways of the municipality to the extent such consent is required.

(b) *Distribution facilities to be purchased.*—The term "distribution facilities" as used in subsection (a) shall include distribution lines and other facilities constructed or installed by the electric supplier in the area to which the purchase option applies, for the rendering of retail electric service except (1) meters, (2) distribution transformers of voltages not compatible with those of the acquiring electric supplier, (3) substations of such a voltage that are not compatible with operations of the acquiring electric supplier, (4) facilities for provision of service by the secondary supplier to premises the electric load of which such secondary supplier may continue to serve under subdivision (a)(3), and (5) such facilities designated by the supplier as necessary to continue its service in an area not subject to the purchase option herein or to serve such supplier's own load. (Acts 1985, No. 85-645, p. 983, § 4.)

§ 37-14-34. Resolution of disputes as to sales or purchases of facilities.

In the event that a dispute should arise between two or more electric suppliers in connection with the purchase of distribution facilities under Section 37-14-32 or Section 37-14-33, the primary electric supplier involved may petition the circuit court for the judicial circuit in which the distribution facilities to be purchased are located to determine such matters as are in dispute between the parties. If the purchase of distribution facilities proposed to be purchased under the escrow notice described in subdivision (a)(1) of Section 37-14-33 is not closed within six months after the date of the escrow notice and if the

primary electric supplier has not filed a petition for resolution of disputes in the appropriate court within 14 days after six months from the date of the escrow notice, then the primary electric supplier's exercise of the option shall be void and of no further effect and the primary electric supplier shall have no right to purchase such facilities thereafter.

If a petition is filed with the appropriate circuit court, the sale of the facilities shall be closed within 90 days from the date of the issuance of a final order of the circuit court (or from the date of the decision of an appellate court if such matter is appealed). If the closing is not completed within such 90 days due to the failure of the primary electric supplier to close for any reason, the primary electric supplier's exercise of the option shall be void and it shall thereafter have no further right to purchase the distribution facilities covered by the escrow notice. (Acts 1985, No. 85-645, p. 983, § 5.)

§ 37-14-35. Applicability of certain provisions of Title 37.

With respect to any sale of facilities consummated pursuant to the provisions of this article, the provisions of Section 37-1-50 shall not be applicable to such sale or to the cessation by a utility of rendering service from such facilities involved in such sale. To the extent of any conflict between this article and the provisions of Section 37-4-60 through Section 37-4-65, the provisions of this article shall govern and control. (Acts 1985, No. 85-645, p. 983, § 6.)

§ 37-14-36. Special rules for elimination of duplication.

The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set

forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 18, 1985 regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1985 regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 18, 1985 regarding electric service areas in Ozark, Alabama.

(7) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 18, 1985 regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(8) Agreement among Covington Electric Cooperative, the City of Elba, Alabama and the City of Elba Water and Electric Board dated as of January 29, 1985 regarding electric service in and around Elba, Alabama.

(9) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 18, 1985 regarding electric service areas in Flomaton and Brewton, Alabama.

(10) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983 and January 31, 1984 regarding electric service in areas around Troy, Alabama, and the sale of distribution facilities.

(11) Agreement between Alabama Power Company and Cullman County Electric Cooperative, Inc. dated as of January 2, 1985 regarding electric service areas in Cullman and Winston counties, Alabama.

(12) Agreement between South Alabama Electric Cooperative, Inc. and the City of Brundidge dated April 11, 1984 regarding electric service in and around the City of Brundidge, Alabama.

(13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967 relating to electric service in the City of Evergreen.

(14) Agreement between Covington Electric Cooperative and the City of Andalusia reflected in and reaffirmed by the resolution of the City of Andalusia dated January 29, 1985.

(15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

If any agreement specified above is hereafter terminated pursuant to provisions of such agreement authorizing such termination, the rules contained in such agreement shall not, thereafter, be binding for the prevention of duplication of electric facilities from and after the date of termination. After such date, the rules established in Sections 37-14-32 and 37-14-33 hereof shall govern; provided, however, in the event the agreement related to service inside a municipality, the right of the primary electric supplier to exercise an option to purchase facilities under Section 37-14-33 shall be governed by the time limits established in Section 37-14-33.

Nothing in this article shall apply to affect valid regulations or contracts of the Tennessee Valley Authority or other suppliers of electricity who may not be lawfully regulated by the state. Subsequent to May 20, 1985, suppliers shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers affected by the agreement, respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed by the legislature and the legislature has amended this section to mandate the implementation of the provisions of such agreement. (Acts 1985, No. 85-645, p. 983, § 7.)

§ 37-14-37. Provision of retail electric service in violation of article.

(a) If an electric supplier commences construction of facilities in violation of the provisions of this article, any aggrieved electric supplier which is designated herein as the entity to provide such service (the "aggrieved electric supplier") may petition the circuit court for the judicial circuit in which the facilities are being constructed by the offending electric supplier for an injunction to prevent the offending electric supplier from completing the facilities for provision of the retail electric service in question.

(b) If an electric supplier believes that another electric supplier has already rendered or extended electric service at retail to a premise which was designated to be served by the aggrieved electric supplier, the aggrieved electric supplier shall give notice in writing to the offending electric supplier of the potential violation of this article. The offending electric supplier shall have 45 days to determine whether it is in violation of this article. If the offending electric supplier concludes that it is violating this article, it may cease rendering and extending electric service at retail to the premises in question at the time and upon the schedule designated in writing by the aggrieved electric supplier and the offending electric supplier shall have no liability to the aggrieved electric supplier for violation of this article. If the offending electric supplier does not cease rendering service and remove its distribution facilities within the 45 day period or within such longer period designated by the aggrieved electric supplier, the aggrieved electric supplier may file suit in the circuit court for the judicial circuit in which the rendition or extension occurs to enjoin the offending electric supplier from continuing such rendition or extension and for damages. If a violation of this article is proved, the offending electric supplier shall (1) remove its facilities constructed for the rendition of retail electric service to the premises at the time and upon the schedule designated in writing by the aggrieved electric supplier; and (2) pay to the aggrieved electric supplier 25 percent of the gross revenues derived by the offending electric supplier from the sale of electric service in violation of this article from and after the date that is 45 days after the date on which the notice of violation was given. In addition, the offending electric supplier shall reimburse the aggrieved electric supplier for all witness fees, court costs, reasonable attorney fees and other expenses incurred in any litigation to enforce the aggrieved electric supplier's rights under this article. If the violation is not proved, the aggrieved electric supplier shall reimburse the offending electric supplier for all wit-

ness fees, court costs, reasonable attorneys fees and other costs incurred in the litigation. All actions or proceedings for injunction or for damages shall be brought within three years after the offending electric supplier first renders or extends electric service at retail in violation of this article. (Acts 1985, No. 85-645, p. 983, § 8.)

§ 37-14-38. Validation procedure; authorization for validation of provisions of article.

In order to foster and encourage the underlying policies of this article and to assure that sales and purchases of distribution facilities, and other transactions and actions authorized or allowed by this article may be conducted in good faith with a knowledge of the validity of the provisions hereof, and further, to assure that irrevocable commitments are not made in the implementation of the provisions of this article without the assurance of their legality and validity, the following judicial review process is hereby authorized and it is declared to be the legislative intent that the provisions of this statute be judicially reviewed and validated pursuant to the procedure set forth herein and that the circuit court enter a judgment in accordance with the procedure set forth herein.

(1) FILING OF COMPLAINT FOR DETERMINATION AS TO LEGALITY OF PROVISIONS OF ARTICLE.—At any time subsequent to May 20, 1985, an affected secondary electric supplier whose distribution facilities are subject to the provisions of this article and whose facilities may be purchased pursuant to this article by a primary electric supplier may, in its discretion before the closing of such purchase, seek judicial determination of the legality and validity of the provisions of this article. Such complaint shall be filed in the Circuit Court of Montgomery County, Alabama which shall have exclusive venue for the determination of all questions of the legality and validity of the provisions of this article. The filing of any complaint for validation shall stay the dates established

for the closing of all sales of facilities pursuant to the provisions of this article until, with respect to each situation in which intent to exercise the option to purchase has been or is thereafter announced, a date is established by the mutual agreement of the affected primary and secondary electric supplier, which date shall not be in excess of 90 days after the final resolution of the action to determine the legality and validity of the provisions of this article, including any appeal therefrom. It is the intention of the legislature that implementation of the provisions set forth in this article shall not be stayed, other than as set forth above, during the pendency of any such litigation because of the need to eliminate, as soon as possible, duplication of electric distribution facilities.

(2) CONTENTS OF COMPLAINT; ORDER AND NOTICE OF HEARING TO SHOW CAUSE.

a. The complaint by appropriate allegations, references and/or exhibits shall briefly state the following: The authority for the purchase and sale of distribution facilities and other transactions and restrictions under this article; the nature of any municipal franchise which will be affected; a general description of restrictions imposed by this article; and the impact which such restrictions and sale shall have on the parties and the public.

b. The judge of said court shall, upon the filing and presentation of said complaint, issue an order against the citizens of the state, all municipalities and governmental units and other defendants requiring them to show cause, at a time and place to be designated in said order, which time shall be not less than 35 days nor more than 56 days after the issuance of such order, and which place shall be within Mont-

gomery County, why said purchase and sales and the other transactions and restrictions and all other proceedings under this article should not be validated and confirmed. Notice of such order shall be given in accordance with c, d and e below.

c. The Attorney General of the State of Alabama shall be the designated representative of the citizens of the State of Alabama and shall appear on their behalf for all purposes in any proceeding brought pursuant to this section.

d. Prior to the hearing of said cause, the clerk of said court shall publish, in a newspaper of general circulation published in Montgomery County, once each week for at least three weeks before the hearing, the first publication which would be at least 21 days before such hearing, a notice addressed to the citizens of the State of Alabama and all municipalities and governmental units requiring them, at the time and place specified in the order providing for the hearing of such case, to show cause, if any there be, why said purchase and sale or other transaction and restriction that may be referred to in the complaint should not be validated and confirmed. In addition, the clerk of said court shall also publish notice to the citizens of the state and all municipalities and governmental units in newspapers of general circulation customarily published not less often than five days during each calendar week in the Cities of Andalusia, Birmingham, Dothan, Florence, Gadsden, Huntsville, Mobile, Selma and Tuscaloosa. By the publication of such notice, all citizens of the state, all municipalities and governmental units shall become parties defendant to such proceedings, and the court shall have jurisdiction of them the same as if each of them were named individually

as party defendants in said complaint and personally served with process.

e. In addition to the publication and notice set forth in paragraph d, the clerk of the Circuit Court in Montgomery County shall also cause a summons and complaint to be served upon the Attorney General of the State of Alabama as representative of all citizens of the State of Alabama and upon all other parties named as defendants in the action.

f. The plaintiff shall certify to the court, in writing, with an attached list, that it has mailed a copy, by certified mail, return receipt requested, of the complaint filed in the action to each other electric supplier in the state, as defined in this article. Said notice to said electric suppliers shall inform them of the time and place of the hearing and shall contain a copy of the complaint filed herein. The notice required by this paragraph shall be mailed not less than 21 days prior to the date set for the hearing.

g. Each electric supplier, municipality and governmental unit which receives notice pursuant to the provisions set forth in d, e and f above, or which receives notice in any manner whatsoever of this action, may petition the court, as a matter of right, to intervene in said action and to participate in the hearing provided for in subdivision (3) of this section.

h. The failure of any electric supplier, municipality and/or governmental unit having actual or constructive notice of the proceeding to exercise the right to intervene and participate in the hearing shall be deemed a waiver of any right such electric supplier, municipality

or governmental unit may have to participate and to challenge, contest or otherwise question the validity of the provisions of this article.

(3) HEARING AND ENTRY OF JUDGMENT; APPEALS FROM JUDGMENT OF CIRCUIT COURT.—At the time and place designated in said order, the judge of said circuit court shall proceed to hear and determine all questions of law and of fact in said civil action, and he shall make such order, or orders, as to the proceedings in said civil action as will best preserve and protect the interests of all parties and to enable him to enter a final judgment with the least possible delay. The final judgment shall find the facts specially and shall state separately the judge's conclusions with regard to any and all legal issues raised with regard to the legality and validity of the provisions of this article and shall state the judge's conclusions of law thereon. Any citizen of the state may appear in such proceedings, either personally or by attorney, and any party thereto, whether plaintiff, defendant or intervenor, dissatisfied with the judgment of the court may appeal therefrom to the Supreme Court of Alabama in accordance with the Alabama Rules of Appellate Procedure. Such appeal shall take priority in the supreme court over all other cases therein pending, except petitions for writ of habeas corpus.

(4) WHEN JUDGMENT OF CIRCUIT COURT FINAL AND CONCLUSIVE AS TO VALIDITY OF PURCHASE, SALE AND OTHER TRANSACTIONS OR RESTRICTIONS UNDER ARTICLE.—If the circuit court shall enter a judgment validating the provisions of this article and no appeal shall be taken within the time prescribed within the Alabama Rules of Appellate Procedure; or, if an appeal is taken and the judgment validating the provisions of this article shall be affirmed by the Supreme Court; or, if the circuit court shall render

a judgment refusing to validate the provisions of this article, and on appeal such judgment shall be reversed by the Supreme Court (in which case the supreme court shall issue its mandate to the circuit court requiring it to enter a judgment validating the provisions of this article), the judgment of the circuit court validating the provisions of this article shall be forever conclusive against all citizens of the state, electric suppliers, municipalities and other governmental units having actual or constructive notice of the proceedings as to the validity of the provisions of this article.

(5) COSTS OF PROCEEDINGS.—The court costs in any proceeding brought under this article shall be paid by the electric supplier commencing the action.

(6) ARTICLE NOT APPLICABLE WHERE THE VALIDITY OF PURCHASE, SALE OR OTHER TRANSACTION IS IN CONTROVERSY IN PENDING ACTIONS OR PROCEEDINGS.—No action shall be commenced challenging the legality or validity of the provisions of the article, or the legality or validity of a purchase and sale transaction or restriction under this article where the legality or validity of the article is in controversy in any prior pending civil action or proceeding in any court or has been determined in any such action. In the event any action is pending in any circuit in the state which raises or challenges the legality or validity of any provision of this article at the time an action is filed under this section, such pending action shall be transferred to the Circuit Court of Montgomery County and shall be consolidated with the action filed pursuant to this section and the consolidated proceeding shall be adjudicated in accordance with the procedures set forth in this article. (Acts 1985, No. 85-645, p. 983, § 9.)

§ 37-14-39. Effect of any ruling of invalidity.

If any part of Section 37-14-32, Section 37-14-33 or Section 37-14-36 of this article is declared invalid under the constitution or laws of this state, including invalidity as a result of impairing unconstitutionally the obligations of a municipal franchise, such declaration shall render invalid all parts which remain; provided, however, that any ruling that the provisions of this article impair unconstitutionally the obligations of any contract other than a municipal franchise shall not render invalid the application of the article in all instances not covered by such contract. Notwithstanding such invalidity, action taken by any party in conformity with the provisions of this article shall be considered lawful actions by such party; provided, however, any electric service rendered which would have been illegal or unlawful or violative of any contractual provision absent this article shall be terminated and the facilities shall be removed following any determination of the invalidity of this article. In all other respects, the provisions and applications of this article shall be deemed to be severable and a declaration of invildity as to any other part or as to any application thereof to any person or circumstance shall not render invalid the parts or applications which remain. (Acts 1985, No. 85-645, p. 983, § 10.)

§ 37-14-40. Repealer; actions taken pursuant to inconsistent provisions.

Except as provided in this section, all laws or parts of laws in conflict with the provisions of this article are hereby repealed. In the event, as a result of a final adjudication in Dixie Electric Cooperative, et al. vs. The Citizens of the State of Alabama, et al., Civil Action No. CV 84-V-891-N, it is determined that Act No. 84-206 of teh Alabama Legislature, Regular Session, was valid and constitutional, such Act No. 84-206 shall remain in effect. The principles of this article which are inconsistent with

the provisions of Act No. 84-206 shall no longer be effective with the following exceptions;

(1) The agreement adopted as being in the public interest which is listed in Item 11 of Section 37-14-36.

(2) The agreement adopted as being in the public interest which is listed in Item 12 of Section 37-14-36.

(3) The agreement adopted as being in the public interest which is listed as Item 13 of Section 37-14-36.

(4) The agreement adopted as being in the public interest which is listed as Item 14 of Section 37-14-36.

To the extent actions are taken pursuant to this article which are inconsistent with actions required to be taken under Act No. 84-206, the actions taken hereunder shall be considered lawful. In the event Act No. 84-206 is declared to be valid and constitutional, the time periods for purchase of facilities set forth in Section 37-14-4 shall be extended to occur within nine months from the date of final adjudication of validity. (Acts 1985, No. 85-645, p. 983, § 11.)

APPENDIX J

SERVICE AREA AGREEMENT

AGREEMENT

between

THE CITY OF TARRANT CITY, ALABAMA

and

ALABAMA POWER COMPANY

THIS AGREEMENT, made and entered into as of the 8th day of June, 1983, by and between THE CITY OF TARRANT CITY, ALABAMA, (hereinafter called "The City" or "Tarrant City"), a corporation duly created, organized, and existing under and by virtue of the laws of the State of Alabama, and ALABAMA POWER COMPANY (hereinafter called "Company"), a corporation duly created, organized, and existing under and by virtue of the laws of the State of Alabama.

WITNESSETH

WHEREAS, The City and the Tennessee Valley Authority ("TVA") are parties to a power contract dated October 1, 1980, under which electric power and energy are supplied by TVA at wholesale and purchased by The City for resale at retail to electric consumers located primarily within the present corporate boundaries of the City of Tarrant City, Alabama with such areas in Tarrant City being shown in yellow and green colors on the map attached hereto as Exhibit 1; and

WHEREAS, Company also sells electric power and energy at retail to consumers located within and outside said corporate boundaries of Tarrant City; and

WHEREAS, the parties hereto recognize that the operation of electric facilities of the Company and The City serving residential, commercial, and industrial consumers within the same areas has resulted in wasteful

and undesirable duplication of facilities which is not in the public interest; and

WHEREAS, it is the desire of the Company and The City to eliminate to the fullest extent possible any occasion for disputes in the future, and to eliminate to the fullest extent possible consistent with the public interest duplication of Company's and The City's facilities with corresponding preservation of and improvement in esthetic and environmental values and improvement in electric service reliability; and

WHEREAS, it is desirable in the interest of electric system planning to stabilize the areas and customers or potential customers for which the respective parties hereto have the responsibility to provide electric service; and

WHEREAS, upon consummation and implementation of this agreement and contracts growing therefrom, the areas involved shall be assured of more reliable and efficient electric service, with less encroachment of electric facilities upon the environmental and esthetic values; and also without unnecessarily burdening any of the parties hereto with excessive costs resulting from duplicate facilities, which wasteful costs are in the long run paid by the electric consumer; and

WHEREAS, the principles set forth herein have been determined to be consistent with the principles of the Tennessee Valley Authority Act of 1933;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto mutually agree as follows:

1. The parties hereto recognize that the maintenance of dual service and the duplication of electric facilities in the Tarrant City, Alabama area have resulted in uneconomic operating arrangements and wasteful duplication of facilities which lessen esthetic and environmental values and which can best be eliminated by the parties conducting their electric system operations in accordance with

arrangements as described in this Section. The general principles set forth in this Section 1 shall be implemented in the manner set forth in greater detail in the other sections of this agreement, and in the other contracts to be executed between the parties pursuant to this agreement, all of which are intended to maximize electric service reliability.

a. The City will distribute electricity to (a) all residential customers within the corporate limits of Tarrant City, Alabama, as the same now exists (as shown in yellow and green colors on the map marked Exhibit 1 hereto); (b) to all non-residential customers within such areas except as specified in Section 6; and (c) to that premises outside such present city limits which The City is permitted to serve hereunder, namely, the premises of Citadel Cement Company (including any successor company or companies that buys, leases, or operates on the property now known as the Citadel Cement Company Property). Except to the extent permitted by Section 4, in no event shall The City distribute electricity purchased from TVA or others or generated by The City to any consumers located outside the areas shown in yellow and green colors on the map marked Exhibit 1 attached hereto and made a part hereof. To the extent and in the manner specified in Section 4, The City shall be entitled to extend its service within the area colored brown after such area is annexed hereafter by Tarrant City.

b. Company will discontinue the distribution of electricity within the present corporate limits of Tarrant City, Alabama, being the areas shown in yellow and green on Exhibit 1, being also labeled Areas A and B, at a date when Company has completed its inventory or evaluation of Company's electric facilities located therein and has made satisfactory arrangements for the disposal of such facilities as hereinafter provided, except Company shall (a) continue to supply electric service to those present and future non-residential customers specified in

Section 6 hereof located within such Areas A and B, and (b) continue to maintain transmission and distribution facilities through Areas A and B necessary to provide electric service to customers in other areas outside the city limits. At such time as Tarrant City shall annex any of the area colored brown on the map attached as Exhibit 1, Company shall discontinue distribution of electricity in such area in the manner and to the extent specified in Section 4.

2. *Future Electric Service Within Present Corporate Limits in Area Designated as "Area A."*

a. Inside the city limits of Tarrant City, within the area referred to herein as "Area A" which is shown in yellow on Exhibit 1, The City and Company presently operate competing electric distribution systems, but hereafter The City shall serve all existing and future electric consumers located in Area A, except certain non-residential customers specified in Section 6 below.

b. Within twelve (12) months from the effective date of this agreement, or as soon as practical thereafter, Company shall dismantle and remove all of its existing electric facilities serving consumers within Area A except (1) house power units, (2) facilities for service to non-residential customers which Company is to continue to serve, as provided in Section 6, (3) facilities for electric service to Company operations, and (4) facilities necessary for Company's use in maintaining service to Company's consumers in adjacent areas outside Area A. Company shall have the right to construct new facilities in Area A which are necessary to serve existing or new non-residential customers which Company is to serve as provided in Section 6, and to tie together its system. The City and Company shall within three (3) months from the effective date of this agreement jointly conduct an inspection of Company's facilities to be dismantled and removed and The City shall have an option to purchase all or any part of such facilities at the Company's repro-

duction cost less depreciation as of the date of purchase, provided that The City exercises its option within ninety (90) days following completion of such inspection, and Company shall forthwith inventory such facilities as to which The City has exercised its option, and shall promptly close the sale thereof. The City shall within thirty (30) days from the date hereof assume all obligations of Company to owners or occupants of premises in which house power units are installed.

3. *Future Electric Service Within Present Corporate Limits in Area Designated as "Area B."*

a. Inside the city limits of Tarrant City, in the area referred to herein as "Area B," which area is shown by green color on Exhibit 1, and which encompasses all areas outside Area A now located within the corporate limits of Tarrant City, The City and Company presently operate competing electric distribution systems, but hereafter The City shall, within twelve (12) months from the effective date hereof, and after purchasing Company's facilities therein as hereinafter provided in Subparagraph 3(b), assume responsibility for electric service to all existing and future consumers located in Area B, except certain non-residential customers as provided in Section 6.

b. Promptly after the effective date hereof, Company shall prepare an inventory and an evaluation of its electric facilities located within Area B (and a copy thereof will be furnished to The City for verification) and promptly thereafter The City shall purchase and Company shall sell such electric facilities for a price equal to Company's reproduction cost less depreciation of such facilities plus severance damages of $1,429,233.00. The City shall pay the Company the amount due for reproduction less depreciation for the facilities to be conveyed together with the severance damages at the date of closing. Electric facilities to be covered shall include all of Company's facilities in Area B, including installed house power units, except (a) those facilities necessary

for Company's use in serving those non-residential customers which Company is to continue to serve pursuant to Section 6; or (b) necessary for Company's use in maintaining service to Company's consumers in adjacent areas outside Area B. Company shall have the right to construct new facilities in Area B which are necessary to serve existing or new non-residential customers which Company is to serve as provided in Section 6, and to tie together its system. The City shall assume all obligations of Company to owners or occupants or premises in which the house power units are installed. As of the effective date of such transfer, The City shall serve all consumers in Area B except for those non-residential consumers which shall be served as provided in Section 6.

4. *Future Electric Service in Areas Annexed by City in Future, Presently Located Outside Present City Corporate Limits, But Located Within Area Designated as "Area C" on Exhibit 1.*

Company presently provides the electric service to all customers in the area designated as "Area C," which is shown in brown color on Exhibit 1. In Area C, Company shall continue to provide such service until the area or portions of such area are from time to time annexed by Tarrant City. The City shall, in any portion of the Area C annexed, within twelve (12) months of any such annexation, take over service to customers within such newly annexed portion of Area C on the same basis and to the same extent, and under the same arrangements, which respect to sale of facilities, as provided for in Section 3 hereof concerning Area B, except that in the annexed portions of Area C, The City shall compensate Company for its electrical facilities by paying reproduction costs less depreciation plus an amount for severance damages equal to two years' revenue from the customers served by such facilities (which said sum shall be twice the gross revenue received from such customers during the 12-month period preceding the sale of such facilities),

and any adjustment or rearrangement costs resulting from the sale of a portion of the Company's facilities. Severance damages shall be payable, at the option of The City, (i) in ten (10) equal annual installments beginning on the closing date, or (ii) a lump sum at the date of closing in which event the present worth of the severance damages otherwise payable in accordance with 4(i) above shall be determined using conventional present worth calculation techniques and a present worth (discount) factor equal to the then current yield on U. S. Treasury obligations having a maturity (or remaining maturity) of approximately ten (10) years from the closing date. Company shall continue to serve any portion of Area C which is not annexed. Should The City fail to exercise its right to acquire the facilities within such annexed area within such twelve (12) month period, the Company shall continue to maintain such facilities in such area and The City shall not extend its facilities for electric service into such area. Company shall also maintain facilities to serve those non-residential customers in the area which Company is to serve in accordance with Section 6.

5. *Future Electric Service in Area Outside Tarrant City Corporate Boundaries and Located Outside Dashed Colored Areas on Exibit 1.*

The City shall not provide service from power obtained from TVA or others or generated by The City to any customers located in areas outside the areas colored in yellow, green and brown on Exhibit 1 (except the Citadel Cement Corporation plant, or its successors as provided in Section 1 hereof), whether or not such areas are annexed into and made a part of Tarrant City.

6. *Service to Certain Non-Residential Customers in Areas A, B and C.*

It is recognized by the parties that with respect to certain non-residential customers which are presently located within Areas A, B, and C, and certain of such

customers which may hereafter be located in such area, service by Company shall continue (or shall be permitted) since such service will not involve duplication of facilities. Thus, while Company shall terminate electric service to customers with Areas A, B, and C at the times and in the manner specified in Sections 2, 3, and 4 above, it shall, nevertheless, continue to provide service to those non-residential customers in such areas as specified below.

a. Within Areas A and B (and after annexation to Tarrant City, within Area C) Company shall continue to provide services to a premises where (i) an existing customer of the Company has an electric load of 800 kilowatts or greater, or (ii) where a customer is served from a substation or step-down transformer from 44 kilovolts or higher, which substation or transformer is devoted exclusively to service to a particular premises.

b. Within Areas A and B (and within Areas C after annexation to Tarrant City), non-residential customers at premises which are adjacent to the right-of-way of the Tarrant-Pinson Highway (as designated on the map attached hereto as Exhibit 1) from the intersection of such Highway with the Tarrant-Huffman Road northeast, shall have the right individually to elect whether electric service shall be rendered by Company or The City. Such election shall be made by existing customers within twelve (12) months after the effective date of this Agreement, or in the case of customers in Area C, within six (6) months after annexation to The City. New customers shall make such election at the time service is first rendered to the premises. Once election is made, neither party shall render service to such a premises served by the other.

c. Except for service provided by Company pursuant to subparagraph b above, The City shall provide service to all new customers locating within Areas A and B (and within Area C after annexation thereof to Tarrant City) which have an initial contract demand of less than 5,000 kw; provided, however, if The City and Company mutually agree, upon request for such agreement by the

customer, that service by Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by Company.

d. Any new customers locating in Areas A, B, and C having an initial contract demand of 5,000 kw or more shall be served by Company. With respect to any customer in such areas whose initial contract demand is not 5,000 kw or more and who is served by The City, but whose contract demand, or actual monthly demand when all meters serving the contiguous facilities to such customers are totaled, equals 5,000 kw or more for six (6) consecutive months, such customer shall be transferred to, and shall be served by, Company, such transfer to take place within three (3) months after the last day of the sixth (6th) consecutive month in which the demand exceeds 5,000 kw. The City and Company shall make such arrangements as may be necessary to accomplish the transfer of any such customer and cooperate in every way in making arrangements to facilitate a change in service. The City agrees to include provisions for such transfer in electric service contracts with all of its non-residential customers whose demands can possibly exceed 5,000 kw during the term of such contract. At the time of transfer of any such customer to Company, Company shall purchase from the The City all electric facilities which The City used in supplying service to such customer which are not useful on the remainder of The City's system. Company shall pay The City reproduction cost less depreciation for any facilities so purchased, plus severance damages of an amount equal to two years' revenue from each customer transferred and any adjustment or rearrangement costs resulting from such transfer. Severance damages shall be payable, at the option of the Company, (i) in ten (10) equal annual installments beginning on the closing date, or (ii) a lump sum payable at closing, in which event the present worth of the severance damages otherwise payable in accordance with 6(d)(i) above shall be determined using conventional

present worth calculation techniques and a present worth (discount) factor equal to the then current yield on U.S. Treasury obligations having a maturity (or remaining maturity) of approximately ten (10) years from the closing date.

7. *Franchise Rights of Company*: Company's franchise with Tarrant City shall remain in full force and effect; provided, however, that Company shall not exercise its rights under said franchise in a manner inconsistent with this agreement.

8. *Effective Date—Approvals*: This contract, although executed by all parties hereto, shall not be effective until (a) this agreement is sanctioned by the Legislature of the State of Alabama as being in the public interest; (b) all approval necessary from state and federal regulatory bodies has been obtained; and (c) agreement or acknowledgment of TVA has been obtained that this agreement is consistent with the provisions of the Tennessee Valley Authority Act and its power supply contract with Tarrant City. The parties shall use all diligence and us its best efforts to obtain such sanctions and approvals at the earliest possible date.

9. *Schedules*: Numerous dates appear herein, and the parties agree to adjust such dates in the future as appropriate to fit the necessary time schedule as may develop through no fault of the parties.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized officers, as of the day and year first above written.

THE CITY OF TARRANT CITY, ALABAMA

ATTEST:

/s/ [Illegible]
City Clerk

By /s/ [Illegible]
Mayor

ATTEST:

ALABAMA POWER COMPANY

/s/ [Illegible]
Secretary

By /s/ [Illegible]
Executive Vice-President

ACKNOWLEDGMENT OF CERTAIN PROPERTY WITHIN CITY LIMITS OF TARRANT CITY, ALABAMA

THIS DOCUMENT is to acknowledge the present city limits in the E. B. Bibb Addition to Tarrant City as of the date of execution of the Agreement between Tarrant City and Alabama Power Company dated 8th June, 1983.

WITNESSETH

WHEREAS, Tarrant City and Alabama Power Company have entered into an agreement dated June 8th, 1983, the ("Agreement") including Exhibit 1 thereto being a map of the present city limits and surrounding areas; and

WHEREAS, details of a certain area of the present city limits are not capable of being shown precisely, namely in the area of the E. G. Bibb Addition to Tarranty City; and

WHEREAS, the parties desire to show such details on a separate map to assure ease of administration of the Agreement;

NOW THEREFORE, the parties hereto acknowledge that the map attached hereto as Exhibit A reflects the present city limits in the area which is known as the E. G. Bibb Addition to Tarrant City.

IN WITNESS WHEREOF the parties have caused this acknowledgement to be executed this 8th day of June, 1983.

THE CITY OF TARRANT CITY, ALABAMA

ATTEST:

/s/ [Illegible]
City Clerk

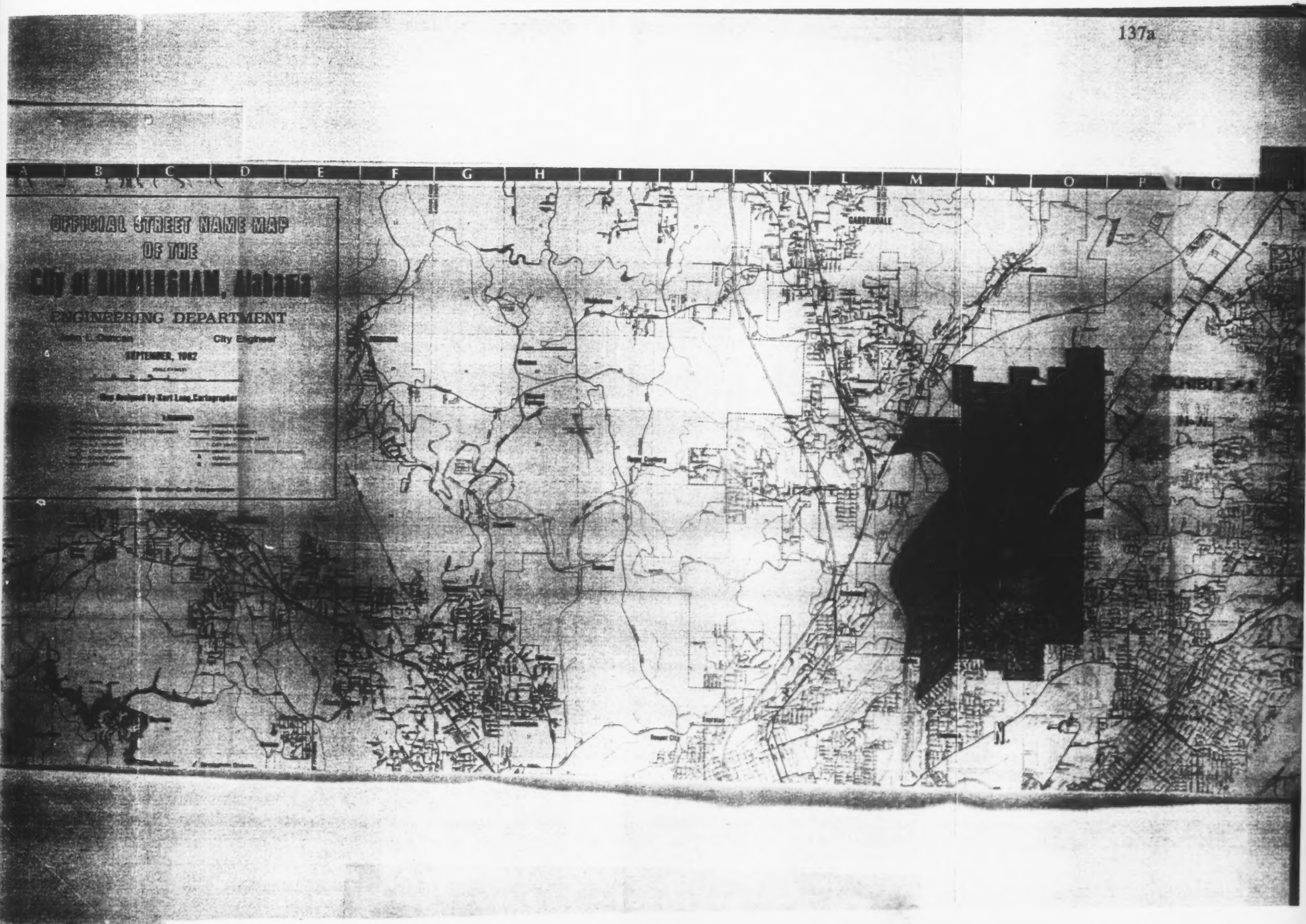
By /s/ [Illegible]
Mayor

ATTEST:

ALABAMA POWER COMPANY

/s/ [Illegible]
Secretary

By /s/ [Illegible]
Executive Vice-President


OFFICIAL STREET NAME MAP
OF THE
City of BIRMINGHAM, Alabama
ENGINEERING DEPARTMENT
John L. Duncan City Engineer
SEPTEMBER, 1962
Map Reviewed by Karl Long, Cartographer
LEGEND
CARDENDALE
EXHIBIT

APPENDIX K

EXCERPT FROM AGREEMENT BETWEEN COVINGTON ELECTRIC COOPERATIVE, INC. AND THE CITY OF ELBA AND THE CITY OF ELBA WATER AND ELECTRIC BOARD DATED JANUARY 29, 1985

* * * *

2. *Service Areas and Facilities To Be Sold.*

(a) Covington shall sell and Elba shall buy, in accordance with the purchase terms and provisions of the Act, all of Covington's Distribution Facilities used in serving Existing Premises which such premises are located within the Existing City Limits except for (i) the transmission substation of Alabama Electric Cooperative, Inc., supplying electricity to the Existing Distribution Lines of Covington, (ii) Covington's Existing Distribution Line from said substation generally following Highway 84 West and Covington's Existing Premises (approximately 42) served therefrom extending to the Existing City Limits, (iii) Covington's Existing Distribution Line from said substation generally running Northwest from the substation to the Taylor Mill Road, then Northeast from Taylor Mill Road to the Elba-Brantley Highway, and East to the Elba-Troy Highway and the Elba-Victoria Highway, and that portion of line where the existing three phase crosses the Elba-Brantley Highway North to the Existing City Limits, and Covington's Existing Premises (approximately 16) served therefrom extending to the Existing City Limits, and (iv) Covington's Existing Distribution Line generally following Coffee County Road 42, and generally known as the Packing House Road, and Covington's Existing Premises (approximately 3) served therefrom.

(b) Covington shall have the right and duty to serve the Existing Premises it retains under Section 2(a) hereof and New Premises that are within two hundred and fifty (250) feet of the Existing Distribution Lines retained by Covington under Section 2(a) and which such New

Premises are also closer to such Existing Distribution Lines than to the Existing Distribution Lines of Elba; provided, however, that with respect to Covington's retained Existing Distribution Line which extends from Highland Avenue toward the Elba-Brantley Highway, for that specific portion of said line which traverses the Roland Powell subdivision, a distance of approximately two thousand two hundred (2,200) feet, Covington shall have the right and duty to serve the Existing Premises it retains under Section 2(a) hereof, and New Premises that are within two hunded (200) feet of the Existing Distribution Line, and which New Premises are also closer to such Existing Distribution Line than to the Existing Distribution Lines of Elba.

(c) Except as provided above, Alba shall have the exclusive right and duty to serve all New Premises inside the Existing City Limits of Elba.

(d) Elba shall sell and Covington shall buy, in accordance with the purchase terms and provisions of the Act, all of Elba's Distribution Facilities used in serving Existing Premises which such premises are located outside the Existing City Limits except for Elba's Existing Distribution Line generally following the Elba-Kinston Highway, and Elba's Existing Premises (approximately 37) served therefrom.

(e) Elba shall have the right and duty to serve the Existing Premises it retains under Section 2(d) hereof and New Premises that are within five hundred feet of Existing Distribution Lines and which such New Premises are also closer to such Existing Distribution lines than to the Existing Distribution Lines of Covington.

(f) Elba shall have the right and duty to serve New Premises located in the following described area: A parcel of land in the SE ¼ of the NE ¼, Section 21, Township 5, Range 20, lying North of the Seaboard Coast Line Railroad and beginning at the intersection of the East line of Section 21 and the North line of the Seaboard Coast

Line Railroad; thence running Northwesterly along said railroad 1,385 feet, thence running North 345 feet, thence running East 1,317 feet, thence running South 230 feet to point of beginning, containing 17 acres more or less; also, a parcel of land in the SW 1/4 of the NW 1/4, Section 22, Township 5, Range 20, lying North of the Seaboard Coast Line Railroad, containing 30 acres, more or less. The total acreage in both of the above described parcels being 47 acres more or less and being located in and a part of Coffee County, Alabama.

(g) Except as provided above, Covington shall have the exclusive right and duty to serve all New Premises outside the Existing City Limits.

(h) Existing Distribution Lines purchased pursuant to this Agreement shall, in the determination of service rights, be deemed to be owned by the purchaser, and not by the seller, on and after January 1, 1993.

* * * *

APPENDIX L

EXCERPT FROM AGREEMENT BETWEEN SOUTHERN PINE ELECTRIC COOPERATIVE AND ALABAMA POWER COMPANY DATED JANUARY 18, 1985

* * * *

1. The parties hereto recognize that the maintenance of dual service and the duplication of electric facilities in the City of Brewton and the City of Flomaton, Alabama would result in uneconomic operating arrangements and wasteful duplication of facilities which lessen aesthetic and environmental values and which can best be eliminated by the parties conducting their electric system operations in accordance with arrangements as described in this section.

(a) In and around the City of Brewton:

(i) Southern Pine shall continue to provide retail service to all premises presently being served from the existing primary distribution lines of Southern Pine in Areas 1, 2 and 3 as shown in yellow on the map of the City of Brewton attached hereto as Exhibit A as well as service to all new premises in such Areas 1, 2 and 3 which can be served from such existing primary distribution line without extension thereof.

(ii) Notwithstanding any other rights to the contrary, Company shall not extend service to any of the premises within the City of Brewton which Southern Pine is entitled to serve pursuant to the provisions of subparagraph 1(a)(i) above. After the passage of legislation relating to the areas in which electric suppliers are to serve ("Area Legislation") Company shall purchase from Southern Pine and Southern Pine shall sell to Company all facilities of Southern Pine which are used for service to premises other than those designated to be served by Southern Pine in subparagraph 1(a)(i) above, except those facilities which Southern Pine shall maintain for provison of service in other areas. Such sale and purchase shall be conducted in accordance with the provision of the Area Legislation.

(iii) Outside the present City Limits of Brewton, notwithstanding the provisions of the Area Legislation, Company shall be entitled to extend retail electric service to all new premises (*i.e.*, premises not presently receiving electric service) in the areas described below, and Southern Pine shall refrain from extension of service to such premises:

(A) Kirkland Road Area: That area bounded on the East by Kirkland Road, on the South by Sowell Road, on the West by the Brewton City Limits and Highway 31 North of such City Limits to Kirkland Road.

(B) Appleton Road Area: That area bounded on the South by Highway 41, on the West by Burnt Corn Creek, on the North by Little Juniper Creek and on the East by Appleton Road to the Brewton City Limits and the City Limits to Highway 41.

(b) In the present City Limits of Flomaton:

(i) Southern Pine shall continue to provide retail electric service to all premises presently being served from the existing primary distribution lines of Southern Pine in Areas 1, 2, 3 and 4 as shown in yellow on the map of certain of Southern Pine's electric distribution facilities in Flomaton which is attached hereto as Exhibit B, as well as all new premises in such Areas which can be served from such existing primary distribution lines without extension thereof.

(ii) Notwithstanding any other rights to the contrary Company shall not extend service to any of the premises within the City of Flomaton which Southern Pine is entitled to serve pursuant to the provisions of subparagraph 1(b)(i) above. After the passage of Area Legislation, Company shall purchase from Southern Pine and Southern Pine shall sell to Company facilities for service to premises in the City of Flomaton other than that designated to be served by Southern Pine in subpara-

graph 1(b)(i) above and except for facilities to be maintained by Southern Pine to provide service to other areas.

(c) The term "Existing primary distribution line" shall mean primary electric distribution line of 7200 volts to ground, or greater, including any replacements or improvements thereto, but not extensions thereof.

* * * *

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

Civil Action No. 89-H-519N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al*,
Plaintiffs

v.

ALABAMA POWER COMPANY, *et al*,
Defendants

AFFIDAVIT OF DR. JOHN W. WILSON

I. *Qualifications*

Dr. John W. Wilson, being first duly sworn, deposes and says that:

(1) I, John W. Wilson am an adult resident of Maryland. I am President of J.W. Wilson & Associates, Inc. Our offiees are at 2600 Virginia Avenue, N.W., Washington, D.C. 20037.

(2) I hold a B.S. degree with senior honors and a Masters Degree in Economics from the University of Wisconsin. I have also received a Ph.D. in Economics from Cornell University. My major fields of study were industrial organization and public regulation of business, and my doctoral dissertation was a study of the price elasticity of demand for electric power.

(3) After completing my graduate education I served as a Captain in the U.S. Army and as an assistant professor of economics at the United States Military Acad-

emy, West Point, New York. In that capacity, I taught various courses in economics at the introductory and intermediate levels. While at West Point, I also served as an economic consultant to the Antitrust Division of the United States Justice Department.

(4) After leaving West Point, I was employed by the United States Federal Power Commission (FPC), first as a staff economist and then as Chief of FPC's Division of Economic Studies. In that capacity, I was responsible for a wide range of regulatory matters involving most phases of FPC regulation of electric utilities and the natural gas industry. Since 1973 I have been employed as an economic consultant by various clients including federal, state and local governments, private enterprise and nonprofit organizations. This work has pertained to issues concerning public utility regulation, antitrust matters and economic and financial analysis.

(5) I have authored a variety of articles and monographs, including a number of studies dealing with competition in the electric utility industry, the price elasticity of demand for electric power, utility ratemaking, the regulation of public utilities and studies dealing with the economic structure and performance of competitive markets. I have consulted on regulatory matters with the Antitrust Division of the United States Department of Justice, the Bureau of Competition of the Federal Trade Commission, the National Academy of Sciences, the Ford Foundation, the National Regulatory Research Institute, (which is the research arm of the National Association of Regulatory Utility Commissioners), the Electric Power Research Institute, (which is the jointly supported research arm of most major electric utilities in the U.S., including utilities such as the defendants in this case), the U.S. Commerce Department, the U.S. Department of the Interior, the Federal Communications Commission, the U.S. Department of Energy, the Small Business Administration, the Department of Defense, the Tennessee Valley Authority, the

Federal Energy Administration, and numerous state and provincial agencies and legislative bodies in the United States and Canada. I was a member of the Economics Committee of the U.S. Water Resources Council, and I was the FPC Coordinating Representative for the Task Force on Future Financial Requirements for the National Power Survey.

(6) I have testified as an expert witness in several court proceedings dealing with competition in the electric power industry and before more than 50 Federal and State regulatory bodies throughout the United States and Canada. I have also appeared on numerous occasions as an expert witness at the invitation of U.S. Senate and Congressional Committees dealing with antitrust and regulatory legislation. In addition, I have been retained as an expert on regulatory matters by more than 25 State and Federal regulatory agencies, including the Alabama Public Service Commission. I have also participated as a speaker, panelist, or moderator in many professional conferences and programs dealing with utility regulation, financial issues, economic policy and antitrust matters. I am a member of the American Economic Association and an Associate member of the American Bar Association and of the ABA's Antitrust and Regulatory Law Sections.

II. *Questions Addressed*

(7) I have been asked to evaluate whether the Defendants' private agreements included as part of the Territorial Acts (hereinafter sometimes also referred to as the Acts) meet the purpose of the "active supervision" test for state action immunity set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 45 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (the *Midcal* test) and explained by the 11th Circuit Court in its remand in this case: "to ensure that private anticompetitve conduct promotes state policy rather than the interests of private parties", (*Municipal Utilities Bd. v.*

Alabama Power Co. 934 F.2d 1493 (11th Cir. 1991) at 1503).

(8) I shall proceed by first discussing the private agreements, their origin, their unsupervised ongoing implementation, and the extent to which they are inconsistent with state policy and promote the anticompetitive interests of the private parties that made them to the detriment of other electric utilities in Alabama including the plaintiff Cities, state ratepayers and the public interest. I will then discuss the special importance, from an economic perspective, of active state supervision under circumstances such as those pursuant to the Acts where the disciplinary forces of market competition have apparently been eliminated by the legislative authorization of anticompetitive conduct to promote state policy.

III. *The Territorial Acts*

(9) The Alabama legislature has passed two statutes that are intended to eliminate allegedly wasteful electric distribution facilities duplication by granting exclusive service territories to certain utilities. These Acts are designed to divide the state into service territories, and they include general provisions for territorial division to meet the statutory goal.

(10) The Eleventh Circuit has approved the Acts as being consistent with a clearly articulated state policy to divide the state into service territories. The Court also approved the general provisions of the Acts as having eliminated "virtually all" discretionary behavior by retail electric service suppliers outside their service territories, so that all actions by suppliers may serve the policy goals of the statute. As such, the general provisions were deemed by the court to pass the active supervision prong of the *Midcal* test.

IV. *Private Agreements*

(11) But, as the Eleventh Circuit recognized in its remand, the private agreements appended to the Acts go

beyond the general provisions. They include specific privately structured agreements between Alabama Power, certain coops and some municipal electric systems that go beyond the general provision of the Acts so as to impose territorial divisions not contemplated by the Acts and, in some cases, permit ongoing implementation unchecked by active state supervision. These private agreements do not meet the active supervision test of *Midcal.* The purpose of that test has been clearly laid out by the Eleventh Circuit in its remand: "[t]he supervision prong prevents a state from frustrating the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct". (at 1501)

(12) The "state policy" that must be promoted by the conduct of parties to the private agreements, goes well beyond the narrow purpose of dividing service territories to limit facilities duplication. Indeed, if territorial division is achieved, as here, in a manner that undermines the public's interest in efficiency and resource cost minimization for the private unsupervised benefit of the Defendants at great cost to the state of Alabama and to all affected customers, it fails the state policy test.

(13) The term "state policy" encompasses the state policy goal of efficient production and distribution of electricity as well as the limitation of facilities duplication. Thus, restricting competition that results in facilities duplication does not convey to the Defendants a blanket authority to fix territorial boundaries to their private liking independent of active state supervision. The supervision test explicitly seeks to prevent private anti-competitive conduct that would serve only the interest of those engaging in it, to the detriment of the public interest in efficiently produced and distributed low cost power.

(14) Certain of the private agreements, nevertheless, provide for ongoing discretion by the Defendants, without

state review, in clear violation of the active supervision standard. For example, paragraph 6 (c) of the agreement between Tarrant City, Alabama and Alabama Power Company, dated June 8, 1983 states:

> "Except for service provided by Company pursuant to subparagraph b above, the City shall provide service to all new customers locating within Areas A and B (and within Area C after annexation thereof to Tarrant City) which have initial contract demand of less than 5,000 kw; provided, however, if the City and Company mutually agree, upon request for such agreement by the customer, that service by the Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by Company."

(15) Likewise, the agreement between the City of Evergreen and the Southern Pine Electric Cooperative states in its entirety:

> "WHEREAS, Southern Pine will continue to serve its present customers on its existing lines located within the proposed extension of the city limits, as well as all new customers located along the present existing lines within three hundred feet (300′) from the edge of the right-of-way of street or road, or the lots, or city blocks existing along the lines presently used by Southern Pine Electric Coop, provided however, that any new industry who might locate in these areas shall be negotiated as to who will serve the industry by the Governing Bodies of the City of Evergreen and Southern Pine Electric Co-op [sic]."

(16) Similarly paragraph 4 of the agreement between Cullman Electric Cooperative and The Utilities Board of the City of Cullman states:

> "In the event that either party refuses to make service available to a prospective consumer or consumers in

its service area, the other party may, after submission to it by such prospective consumer or consumers of proof of such refusal to serve, commence serving such consumer or consumers.

. . .

In the event line extensions are constructed by one party in the other party's service area for service to a prospective consumer or consumers in accordance with this section 4, the service area boundary established by this agreement shall be considered automatically revised to include such consumer or consumers in the service area of the party constructing such extensions."

(17) Other private agreements, while not expressly providing for the same degree of ongoing discretion by the parties, were themselves the product of private discretion at the time of their initiation. Some of these private agreements established territorial boundaries that were different than those envisioned under the general provisions of the Act, without reference to any apparent engineering or economic efficiency logic, and representing merely the "bargains" struck by the parties. For example, the agreement between Alabama Power Company and Tallapoose River Electric Cooperative allows the parties, for their own private purposes, to vary the effective date of the boundaries that would have been established by the general provisions of the Act. This effectively modifies the boundaries themselves and violates the active supervision test of *Midcal*.

(18) The agreement between Alabama Power Company and Pea River Electric Cooperative assigns service areas differently from the areas that would have been assigned had Alabama Power simply not exercised its purchase option as provided by the Act. No state scrutiny or supervision of these new agreements was performed.

(19) The agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of

Elba Water and Electric Board provides for the City of Elba to serve an area as large as 40 acres outside the city in return for the City's giving up its purchase option on certain of the Cooperatives distribution facilities within the municipal limits of Elba. There is no evidence the legislature scrutinized or supervised this change in service area designations.

(20) The agreement between Alabama Power Company and Southern Pine Electric Cooperative permitted Alabama Power to extend service to two specifically described areas, the Kirkland Road area, and the Appleton Road area, even though these areas were closer to Southern Pine than Alabama Power and Alabama Power would have to extend its lines to serve them. Rather than implementing state policy objectives, the agreement was a trade-off for Alabama Power's waiving its purchase option on the four areas that Southern Pine was permitted to retain in the City of Brewton. There was no state supervision of this trade-off.

(21) In general, the ways in which the parties to the private agreements have anticompetitively violated the active supervision prong of the *Midcal* test can be summarized as follows:

- Alabama Power, certain cooperatives and some municipal electric systems reached agreements with each other and divided service areas among themselves without the majority of Plaintiff Cities' participation and without reference to customer concerns, either directly or through regulatory oversight.

- The private agreements were made part of the statute without active evaluation or review. There is no record of a discussion of these agreements in open session of either legislative house or of their being referred to any committee for review. This is a clear and direct violation of the simple meaning of the active supervision test under *Midcal*.

- The general provisions of the Acts provide for territorial divisions, but the private agreements go beyond those provisions and allow Alabama Power to serve customers it would not otherwise serve. Such a division of customers, without Cities' or customer participation, and without state review is an unwarranted extension of the general provisions of the Acts.

- Some of the private agreements allow Alabama Power and the coops ongoing discretion to decide among themselves who will serve new customers, without state supervision or the possibility of Cities' or customer participation.

V. *Competition in the Electric Utility Industry*

(22) As discussed below, the electric utility industry, despite its regulated nature, typically embodies important and powerful types of market competition that help to spur efficiency and further the public interest. In circumstances such as those that apparently exist in this case, where competitive forces have been constrained as determined by the legislature to be in the public interest, active state supervision is essential in order to prevent the private exploitation of the constrained markets. The following forms of competition generally exist in electric utility markets and must be replaced with active state supervision when, as here, they are eliminated:

- *Direct price competition to serve a customer or group of customers.* This type of competition may be virtually continuous with sales agreements covering short durations (e.g., for one hour in a spot market) or it may involve long term transactions that last for 20 or more years. Competition between utilities to attract or retain industrial loads in their service territories is a distinct and important form of direct price competition. This type of competition, where it exists, motivates rival utili-

ties to improve service and reduce costs in order to achieve market growth.

- "*Fringe*" *competition to serve (often new) customers around the borders of franchises.*
- "*Franchise*" *competition for an exclusive right to serve a group of customers.* Typically franchises are granted for a significant time period, often between 20 and 30 years. Those utilities that are most efficient and successful in reducing costs stand the best change of renewing and expanding their franchised service areas. The apparent perpetual nature of franchise rights in Alabama pursuant to the Territorial Acts greatly weakens these normal performance incentives thus resulting in considerably greater reliance on active state supervision to assure economic efficiency.
- "*Yardstock*" *competition, in which the performance of one company can be affected by the example of another, either directly or because of regulatory comparisons for ratemaking purposes.* Yardstick competition is most often thought of in terms of a comparison between the performance of investor owned utilities and publicly owned systems, because publicly owned systems are the major alternative to investor owned utilities.

(23) These kinds of competition are not entirely separate phenomenon. For example, the impact of yardstick competition is strengthened considerably when combined with competition for franchises.

VI. *Harmful Effects on the Cities*

(24) The limits on service area growth imposed by the agreements injure the Cities in several ways. The loss of potential customer growth areas reduces the utility revenue stream Cities can expect to receive over time. This can lead to a "death spiral" effect by requiring existing customers to pay a greater share of capacity costs, causing

additional movement out of a city's service area, loss of revenues for other public purposes and further raising costs to remaining customers.

(25) Lack of growth possibilities can also cause Cities and municipal power authorities to forego economies of scale by building smaller than optimally sized units at a time when the Cities may otherwise be able to build efficient units and market the temporary excess (targeted for future customer growth) to others and use the revenue to reduce its current rates.

(26) Moreover, denying municipals the opportunity to serve new areas, threatens the viability of municipals as healthy competitors to other Alabama utilities. For example, because future territorial annexation by municipalities would result in a dichotomy between those citizens who qualify for municipal utility service (because they were "grandfathered" in when the Territorial Acts were passed) and those who do not (i.e., customers in newly annexed areas), such denial may impair municipal growth or (if growth occurs) result in political dissatisfaction with a public service that is available only to some citizens.

VII. *The Value of Competition in Regulated Industries*

(27) When it is unimpaired, franchise competition can discipline utility company actions in powerfully beneficial ways. To survive, let alone prosper, firms must continually find ways to lower costs and prices. If they don't, their competitors will and their franchise may be in jeopardy.

(28) To some degree, sound regulation can serve as an alternative to competition. However, in Alabama the cooperative and municipal systems are not regulated and the private agreements at issue in this case are not subject to any regulatory oversight for any electric suppliers (including Alabama Power) at all. But, even when regulation exists, it can not fully achieve the efficiency incentives provided by competition. This is one reason why federal regulatory policy is moving in the direction of injecting

more competition into electric utility markets. Conversely, the private agreements in this case would serve to reduce the impact of competitive market forces without ongoing active supervision.

(29) Efficiency requires firms to actively seek to continuously reduce costs of service, not just avoid waste. Franchise and yardstick competition provide incentives to seek out lower cost production techniques through improved management efficiency, cost control, and research and development that enhance efficiency over time.

(30) Without the threat of franchise competition, utility managements are free to choose the quiet life removed from the more dynamic quest for product and market improvements. Given the knowledge that their markets are secure and that future growth cannot be inhibited by competitive forces and absent active state supervision, there is little to compel monopoly utilities with exclusive perpetual franchises to develop and introduce new concepts and improvements at the most efficient rate.

(31) The importance of competition as a key factor in regulated industries has long been recognized. For example, in passing the Federal Power Act, the United States Congress created a regulatory system with an eye to preserving and enhancing competition, not replacing it. The initiative for rates is left with private utilities, subject to review and alteration by the Federal Energy Regulatory Commission. The courts have also determined that the Act does not insulate utilities from the antitrust laws, and they have required FERC to look to the policies of those laws in performing its regulatory duties.

(32) In recent years, competitive values have received more explicit endorsement and concrete steps have been taken to rely more on market outcomes. Encouraging competition and relying on competitive market forces where possible to stimulate efficiency and allocate resources is a cornerstone of the National Energy Strategy.

(33) The 11th Circuit Court of Appeals has recognized the important role competition plays in the utility industry. In its remand of this case, the Court spoke of a "national policy in favor of competition" and explained how the very purpose of the active supervision test in *Midcal* was to prevent a state from frustrating that policy "by casting a shadow of State involvement over what is essentially private anticompetitive conduct". (at 1501)

(34) In summary, there is a single indicator for determining whether private agreements pass the active supervision part of the *Midcal* test, i.e., whether they promote the public interest or private interests to the detriment of the public interest. That is, are they likely to cause higher rates (both to customers in the identified service territories and to customers of the Cities), without any corresponding cost or other justification, relative to the general provisions of the statute? In this case it is clear that the private agreements achieve no apparent efficiency and, it is equally clear that they are a private creation unconstrained by active state supervision. As such, the private agreements constitute anticompetitive acts that benefit only the parties to the agreements, while harming the public interest. For this and the other reasons previously stated, the private agreements fail the active supervision test under *Midcal*.

Further affiant saith not.

/s/ John W. Wilson
JOHN W. WILSON

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 26TH DAY OF NOVEMBER 1991

/s/ Margaret R. Wegley
Notary Public

My Commission Expires:
September 14, 1996

[Notary Seal]